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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 249. 39.

ALBERT H. WAITE, PETITIONER,

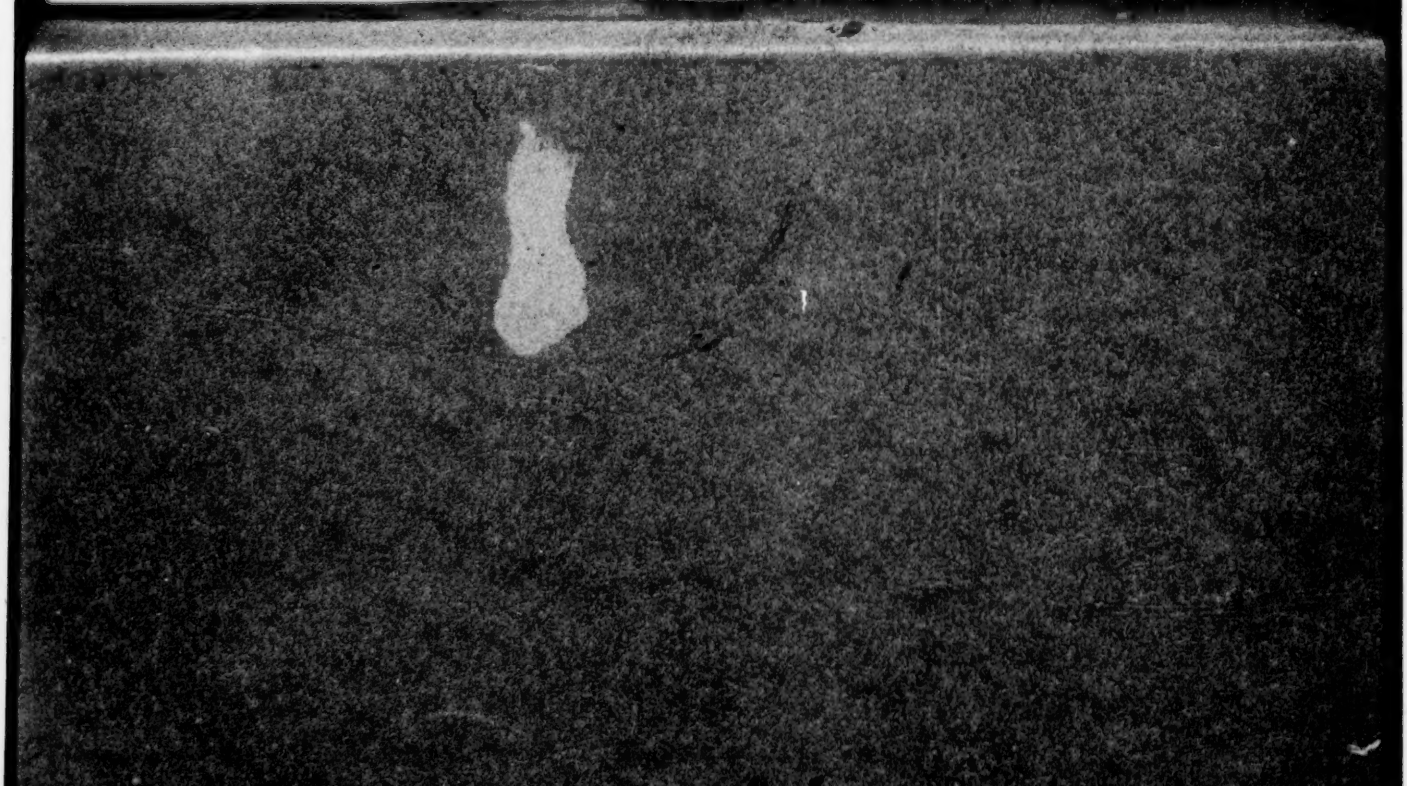
vs.

THE CITY OF SANTA CRUZ.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR CERTIORARI FILED APRIL 11, 1900.
CERTIORARI AND RETURN FILED MAY 17, 1900.

(17,712.)



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1 In the United States Circuit Court in and for the Ninth Circuit, Northern District of California.

ALBERT H. WAITE, Plaintiff,
vs.
CITY OF SANTA CRUZ (a Corporation), Defendant.

Stipulation and Order as to Judgment-roll.

Whereas, the defendant in the above-entitled action is about to apply for a writ of error to the United States circuit court of appeals, from the judgment rendered herein, and is about to apply to the clerk of the above-entitled court for a transcript of the record herein, to be certified to and entered in said United States circuit court of appeals.

And, whereas, the judgment-roll contains the original complaint filed in this action, and the demurrer thereto, both of which documents have been entirely superseded by the subsequent pleadings, upon which said action was tried, namely: by the amended complaint of plaintiff, and the demurrer and answer to said amended complaint, filed by, and on behalf of, defendant.

And, whereas, said original complaint and the demurrer thereto are very voluminous, comprising about two thousand folios.

2 And, whereas, the cost of transcribing said original complaint and the demurrer thereto will involve a large and useless expense in prosecuting said writ of error.

And, whereas, said original complaint, and the demurrer thereto, will be wholly useless for any purpose in said United States circuit court of appeals.

It is therefore stipulated and agreed that said original complaint, and the answer thereto, be eliminated from the record, and from the transcript to be certified to said United States circuit court of appeals, and that the United States circuit court, or the judge who tried this cause, may make an order, based upon this stipulation, directing the clerk to eliminate said original complaint, and the demurrer thereto, from the transcript of the record to be certified and entered in said United States circuit court of appeals.

Dated December 7, 1898.

CHICKERING, THOMAS & GREGORY,
Attorneys for Plaintiff.

LINDSAY & CASSIN AND
JAMES G. MAGUIRE, *Attorneys for Defendant.*

3 In the United States Circuit Court in and for the Ninth Circuit, Northern District of California.

ALBERT H. WAITE, Plaintiff,
vs.
CITY OF SANTA CRUZ (a Corporation), Defendant.

Order as to Record.

Upon the annexed stipulation of the parties to the above-entitled cause, and it appearing to be just and proper, and expedient that the original complaint and demurrer filed herein (both of which have been entirely superseded by the subsequent pleadings of the parties upon which said cause was tried), should be eliminated and excluded from the record to be certified by the clerk of this court to the United States circuit court of appeals, upon defendant's application for a writ of error:

It is ordered and directed that the clerk of this court, transcribing and certifying the record of this cause to the United States circuit court of appeals, shall eliminate and omit from said record said original complaint and the demurrer thereto.

Dated December 7, 1898.

JOHN J. DE HAVEN, *Judge.*

(Endorsed:) Filed December 7, 1898. Southard Hoffman, clerk, by W. B. Beaizley, deputy clerk.

4 In the United States Circuit Court in and for the Ninth Circuit, Northern District of California.

ALBERT H. WAITE, Plaintiff,
vs.
CITY OF SANTA CRUZ (a Corporation), Defendant.

Stipulation Allowing Plaintiff to State Several Causes of Action in One Count.

It is hereby stipulated that the plaintiff in the above-entitled action may file an amended complaint, in which he may set forth several causes of action, if any such he have, without stating them separately, that is to say, that plaintiff may, in such amended complaint, or in any subsequent amended complaint permitted by the court, state in one count his causes of action, on all the bonds and coupons described in the original complaint now on file.

The provisions of the statute requiring the plaintiff, when uniting several causes of action, to state them separately, is waived in order to save both parties to the above-entitled action unnecessary labor and expense.

CHICKERING, THOMAS & GREGORY,
Attorneys for Plaintiff.
LINDSAY & CASSIN, *Attorneys for Defendant.*
JAMES G. MAGUIRE,
Of Counsel for Defendant.

(Endorsed:) Filed November 12, 1895. W. J. Costigan, clerk.

In the Circuit Court of the United States in and for the Ninth Circuit, Northern District of California.

ALBERT H. WAITE, Plaintiff,
vs.
CITY OF SANTA CRUZ (a Corporation), Defendant.

Amended Complaint.

Now comes the plaintiff, and filing this, his amended complaint, alleges:

That said plaintiff was, at all times hereinafter mentioned, and still is, a resident and citizen of the State of Massachusetts.

That said defendant was at all times hereinafter mentioned, and still is, a municipal corporation of the fifth class, duly organized and existing under and by virtue of a certain statute of the State of California, approved March 1, 1866, entitled "An act to incorporate the town of Santa Cruz," and also under and by virtue of a certain statute of the State of California, supplemental to the statute above mentioned, approved March 11, 1876, and entitled "An act to reincorporate the city of Santa Cruz."

That on and prior to the thirteenth day of March, 1894, the said defendant had an outstanding indebtedness in the sum of $360,000, evidenced by the bonds thereof, and on said date the assessed valuation of all the taxable real estate and personal property in said city was $3,907,404.00.

That on the day and year last aforesaid, the mayor and common council of the said city, pursuant to the provisions of an act of the legislature of the State of California, approved March 1, 1893, entitled "An act to amend an act entitled 'An act to authorize the common council, board of trustees, or other governing body, of any incorporated city or town other than cities of the first class, to refund its indebtedness, issue bonds therefor, and provide for the payment of the same (approved March 15, 1883),'" submitted to the qualified electors of the said defendant corporation, at a special election duly called and held for that purpose, and called and held in the same manner in which other elections are held in such city, the question of refunding the said outstanding indebtedness of the said defendant, as then evidenced by the bonds thereof.

That the notice of such election recited the indebtedness to be refunded, together with the denomination, character, time of payment, rate of interest, as well as all other details of the bonds proposed to be issued.

That at such election on the thirteenth day of March, A. D. 1894, more than two-thirds of the qualified electors of the said defendant voted in favor of refunding the then outstanding indebtedness of the said defendant, as evidenced by the bonds thereof, and assented to the execution and issue of the bonds and coupons hereinafter set forth and particularly described.

That thereafter, to wit, on the twenty-sixth day of March, 1894, the said mayor and common council passed and adopted a certain ordinance for refunding its indebtedness, known and designated as "ordinance No. 220 of the common council of the city of Santa Cruz."

That all acts, conditions, or things required by law to be done precedent to the issue of the bonds and coupons hereinafter mentioned, were properly done and approved in legal and due form, as required by law.

That thereafter, to wit, on the sixteenth day of April, 1894, the said city of Santa Cruz, by its mayor and city clerk, thereunto duly authorized, executed three hundred and sixty bonds or obligations, in the sum of one thousand dollars each, in gold coin of the United States, bearing interest in like gold coin at the rate of five per cent. per annum, said interest being payable annually.

That said bonds were of the character known as serials, one-fortieth of the principal thereof, to wit, the sum of nine thousand dollars, being payable annually on the fifteenth day of April, together with the said annual interest on all outstanding bonds.

That said bonds were numbered consecutively from one to three hundred and sixty, both inclusive, and were divided into forty series, consisting of nine bonds each.

That the first series included the bonds numbered from one to nine, both inclusive, and each succeeding series included the nine bonds numbered consecutively after those included — the next preceding series.

8 That the bonds included in the first series were made payable on April 15, 1895, and the remaining series were made payable in consecutive order on the fifteenth day of April in each succeeding calendar year thereafter, until and including the year 1934.

That to each of said bonds were attached interest coupons equal in number to the number of years which the bond had to run before its maturity, executed by the defendant through its mayor and city clerk thereunto duly authorized.

That the nine bonds comprising the said first series were in the words and figures following, to wit:

"Number —. $1,000 *dollars.*

"UNITED STATES OF AMERICA, *State of California.*

"*Bond of the City of Santa Cruz—Refunding Gold Bond.*

"Five per cent. Series 1.

"The City of Santa Cruz, a municipal corporation, in the county of Santa Cruz, State of California, is indebted to, and promises to pay to the bearer, for value received, the sum of one thousand dollars ($1,000), gold coin of the United States, on the fifteenth day of April, A. D. 1895, with interest thereon, in like gold coin, at the rate of five (5) per cent. per annum, payable annually on the fifteenth day of April, of each calendar year from the date hereof, at

the office of the city treasurer of said city of Santa Cruz, on presentation and surrender of the proper interest-bearing coupon hereto attached.

"And for the payment of the principal sum herein named, and the interest accruing thereon, the said City of Santa Cruz is held and firmly bound, and its faith and credit, and all the real and personal property of said city, are hereby pledged for the prompt payment of this bond and interest at maturity.

"This bond is one of a series of bonds of like date, tenor, and effect, issued by the said city of Santa Cruz, for the purpose of refunding the bonded indebtedness of said city and issuing bonds therefor, and providing for the payment of the same under and in pursuance of and in conformity with, the provisions of an act of the legislature of the State of California, entitled 'An act to amend an act entitled "An act authorizing the common council, board of trustees, or other governing body of any incorporated city or town, other than cities of the first class, to refund its indebtedness, issue bonds therefor, and provide for the payment of the same" (approved March 15, 1883),' approved March 1, 1893.

"And in pursuance of and in conformity with the constitution of the State of California, and the ordinances of the city of Santa Cruz, and in pursuance of and in conformity with a vote of more than two-thirds of all the qualified electors of said city of Santa Cruz, voting at a special election duly and legally called and held and conducted in said city as provided under said act, on Tuesday, the thirteenth day of March, 1894, notice thereof having been duly and legally given and published in the manner as required by law, and after the result of said election had been canvassed, found and declared in the manner and as required by law.

"And it is hereby certified and declared that all acts, conditions, and things required by law to be done precedent to and in the issue of said bonds, have been properly done, happened, and performed in legal and due form, as required by law. This bond ceases to bear interest when due, unless presented for payment.

"In testimony whereof, the said city of Santa Cruz, by its mayor and common council, has caused this bond to be signed by the mayor of said city of Santa Cruz, and attested by its said clerk, with the seal of said city attached, this sixteenth day of April, A. D. one thousand eight hundred and ninety-four.

"[SEAL.] WM. T. JETER,

"*Mayor of the City of Santa Cruz.*

"(Attest:) O. J. LINCOLN, *City Clerk.*

(Endorsed:) Number —. "State of California. The City of Santa Cruz. 1,000 dollars. Refunding five per cent. gold bond. $1,000. $1,000. Series 1. Interest payable annually April 15. Principal due April 15, 1895. (Surcharged on face of bond:) $1,000."

That the three hundred and fifty-one bonds comprising the other thirty-nine series were in the same words and figures, save and

except the number of the bond, and the date of the maturity thereof.

11 That the coupons maturing on April 15, 1895, attached to each of the three hundred and sixty bonds aforesaid, were in the words and figures following, to wit:

"$50. $50.

"The City of Santa Cruz will pay to bearer hereof, on the fifteenth day of April, 1895, at the office of the city treasurer of said city, fifty dollars, gold coin of the United States, for interest on refunding bond issued sixteenth day of April, A. D. 1894.

"No. —. WM. T. JETER,

"*Mayor of the City of Santa Cruz.*

"O. J. LINCOLN, *City Clerk.*

"(Surcharged *of* face of coupon:) 1."

That before the delivery of the said bonds and coupons as hereinafter alleged, the said defendant made provision for the collection of an annual tax sufficient to pay the interest on the same as it should fall due, and also provision to constitute a sinking fund for the payment of the principal thereof as it should fall due.

That said bonds and coupons were and are in the form described in the said notice of the special election of March 13, 1894.

That on or about the thirteenth day of April, 1894, the said defendant, by its officers thereunto duly authorized, for value received, delivered the said three hundred and sixty bonds, with the coupons thereunto attached, to one Walter Stanton, who afterwards, and before the maturity thereof, sold and delivered to the plaintiff

12 herein the nine bonds of the first series, numbered from one to nine, both inclusive, and two hundred and eighty-two of the coupons maturing on April 15, 1895.

That said coupons so sold and delivered were the coupons originally attached to and issued with the bonds bearing the following numbers, to wit:

Nos. 1 to 14 (both inclusive).
Nos. 21 to 63 (both inclusive).
Nos. 69 to 182 (both inclusive).
Nos. 184 to 188 (both inclusive).
Nos. 201 to 207 (both inclusive).
Nos. 233 to 243 (both inclusive).
Nos. 245 to 252 (both inclusive).
Nos. 276 to 288 (both inclusive).
Nos. 294 to 360 (both inclusive).

That the said plaintiff ever since has been and now is the lawful owner and holder of the said nine bonds and the said two hundred and eighty-two coupons.

That on the sixth day of May, 1895, said plaintiff presented for payment, at the office of the city treasurer of the said defendant, the nine bonds and the said two hundred and eighty-two coupons, offering to surrender said bonds and coupons upon payment of the same.

That the said city treasurer of the said defendant wholly refuses to pay said bonds, or the coupons so presented, or either or any of them, and still refuses to pay the same.

That no part of said bonds or of the interest due thereon has been paid, and that there is now due and unpaid to the plaintiff on said bonds and coupons the sum of twenty-three thousand
13 one hundred dollars in gold coin of the United States, with interest thereon from the said fifteenth day of April, 1895.

Wherefore, the said plaintiff prays judgment against the said defendant in the sum of twenty-three thousand one hundred dollars, gold coin of the United States, with interest thereon from the fifteenth day of April, 1895, and costs of suit.

CHICKERING, THOMAS & GREGORY AND
GERSTLE & SLOSS, *Attorneys for Plaintiff.*

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

Marcus L. Gerstle, being first duly sworn, says: That he is one of the attorneys for the plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters, he believes it to be true; that the said plaintiff is without the city and county of San Francisco, State of California, where said affiant resides and has his office; that said affiant is familiar with the facts of the case; and for those reasons makes this affidavit on behalf of said plaintiff.

MARCUS L. GERSTLE.

Subscribed and sworn to before me this thirty-first day of October, 1895.

MILTON S. LATHAM,
Notary Public in and for the City and County of San Francisco, State of California.

14 (Endorsed:) Due service by copy of the within amended complaint this first day of November, A. D. 1895, is hereby admitted. Lindsay & Cassin, attorneys for defendant; James G. Maguire, of counsel for defendant.

(Endorsed:) Filed November 12, 1895. W. J. Costigan, clerk.

In the Circuit Court of the United States for the Ninth Circuit and Northern District of California.

ALBERT H. WAITE, Plaintiff, }
vs.
CITY OF SANTA CRUZ (a Corporation), Defendant. }

Demurrer to Amended Complaint.

Now comes the defendant in the above-entitled action, and demurs to plaintiff's amended complaint therein, and as grounds of demurrer states:

I.

1. That said complaint does not state facts sufficient to constitute a cause of action.

2. That the act under which it is alleged that the bonds or obligations mentioned in said complaint were executed is in conflict with the constitution of the State of California, and in conflict with the Constitution of the United States.

3. That said complaint is uncertain in this:

(*a.*) That while said complaint alleges "that all acts, conditions, and things required by law to be done precedent to the issue of the bonds and coupons hereinafter (in said complaint) mentioned, were properly done and approved in legal and due form as required by law," it does not appear therefrom what, if any, acts, conditions, or things required by law to be done precedent to the issue of the bonds or obligations therein mentioned, were or was done or approved prior to the issuance of such bonds or obligations, or any of them.

(*b.*) It does not appear therefrom whether or not the bonds therein mentioned were sold for not less than their face value in gold coin, as required by law.

Wherefore, defendant prays that plaintiff take nothing by this action, and that defendant be hence dismissed with its costs.

LINDSAY & CASSIN,
Attorneys for Defendant.

JAMES G. MAGUIRE,
E. R. TAYLOR, *Of Counsel.*

I hereby certify that, in my opinion, the foregoing demurrer is well founded in point of law.

Nov. 16, 1895.

JAMES G. MAGUIRE, *Of Counsel.*

(Endorsed:) Due service by copy of the within demurrer is hereby admitted this eighteenth day of November, 1895. Chickering, Thomas & Gregory and Gerstle & Sloss, attorneys for plaintiff.

(Endorsed:) Filed Nov. 18, 1895. W. J. Costigan, clerk.

At a stated term, to wit, the July term, A. D. 1896, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court-room in the city and county of San Francisco, on Monday, the third day of August, in the year of our Lord one thousand eight hundred and ninety-six.

Present: The Honorable Joseph McKenna, circuit judge.

ALBERT H. WAITE
vs.
CITY OF SANTA CRUZ. } No. 12094.

Order Overruling Demurrer to Amended Complaint.

The demurrer to amended complaint herein, heretofore heard and submitted, being now fully considered, and the opinion of the court

having been delivered, it is ordered that said demurrer be, and the same hereby is, overruled, with leave to defendant to answer within twenty days.

17 In the Circuit Court of the United States in and for the Ninth Circuit, Northern District of California.

ALBERT H. WAITE, Plaintiff,
vs.
CITY OF SANTA CRUZ (a Corporation), Defendant.

Answer.

Now comes the defendant, and for answer to the amended complaint of plaintiff on file herein:

I.

Denies that on or prior to the thirteenth day of March, 1894, defendant had an outstanding indebtedness in the sum of $360,000, or thereabouts, or in any sum or amount whatever in excess of $270,000, evidenced by the bonds or warrants thereof.

II.

Denies that on thirteenth day of March, 1894, or at any other time or at all, the mayor and common council of said city of Santa Cruz, pursuant to the provisions of an act of the legislature of the State of California, approved March 1, 1893, entitled "An act to amend an act entitled 'An act to authorize the common council, board of trustees, or other governing body of any incorporated city or town other than cities of the first class, to refund its indebt-
18 edness, issue bonds therefor, and provide for the payment of the same (approved March 15, 1893),'" or otherwise or at all submitted to the qualified electors of the said defendant corporation at a special election duly or otherwise or at all held for that purpose, or for any purpose, or called or held in the same manner in which other elections are held in such city, or in any manner, the question of refunding the said outstanding indebtedness, or any indebtedness, of said defendant as then evidenced by the bonds thereof, or otherwise.

III.

Denies that the notice, or any notice, of such election recited the indebtedness to be refunded, together with the denomination, character, time of payment, rate of interest, or all or any other details or detail of the bonds, or any bonds, proposed to be issued, or contained any recitals or recital whatever, and in this behalf alleges that no notice was ever given or published calling or announcing said or any election in the city of Santa Cruz, on the question of refunding the bonded indebtedness, or any indebtedness, of said city of Santa Cruz.

IV.

Denies that at such, or at any, election on the thirteenth day of March, A. D. 1894, or on any other date or day, more than two-thirds of the qualified electors, or two-thirds of the qualified electors, of said defendant, voted in favor of refunding the then outstanding indebtedness, or any indebtedness of the said defendant, as evidenced by the bonds thereof, or otherwise, or assented to the execution and issue, or to the execution or issue, of the bonds and coupons
19 set forth and described in plaintiff's amended complaint, or any bonds or coupons whatever.

V.

Denies that on the twenty-sixth day of March, 1894, or at any other time or at all, the said mayor and common council passed or adopted a certain ordinance, or any ordinance, for refunding its indebtedness, or any indebtedness, of the city of Santa Cruz, known and designated as "ordinance No. 220 of the common council of the city of Santa Cruz."

VI.

Denies that all acts, conditions, or things, or any act, condition, or thing, required by law to be done precedent to the issue of the alleged bonds and coupons mentioned and described in plaintiff's amended complaint, were or was properly done and approved, or properly done or approved, or done or approved, in legal and due form as required by law, or in legal or due form as required by law, or as required by law, or at all.

VII.

Denies that on the sixteenth day of April, 1894, or on any other day or date, the said city of Santa Cruz, by its mayor and city clerk, or otherwise or at all, executed three hundred and sixty (360) bonds or obligations, conditioned as set forth in plaintiff's complaint, or otherwise, or at all.

In this behalf defendant admits that on or about said sixteenth day of April, 1894, one William T. Jeter and one O. J. Lin-
20 coln, as mayor and city clerk respectively of said city of Santa Cruz, without any right, jurisdiction, or authority whatever, signed three hundred and sixty (360) documents, purporting to be refunding bonds, with interest coupons attached thereto, of the city of Santa Cruz, and purporting to be conditioned, and of character as set forth in plaintiff's complaint herein; but this defendant alleges that the pretended execution of said purported bonds and coupons was wholly unauthorized, invalid, and void.

VIII.

Denies that before the delivery of the said bonds and coupons, as alleged in plaintiff's amended complaint, or at any other time, the said defendant made provision for the collection of an annual tax, or any tax sufficient to pay the interest on the same, or any portion

thereof, as it should fall due, or otherwise or at all, and denies that defendant made provision to constitute a sinking fund, or any fund, for the payment of the principal thereof, or any portion thereof, either as it should fall due, or otherwise, or at all, and in this behalf, defendant alleges that the pretended ordinance of said mayor and common council of the city of Santa Cruz, purporting to make provision for the collection of an annual tax as alleged in plaintiff's complaint, was wholly unauthorized by any provision of law, or election, or choice or direction of the said city of Santa Cruz, or the people of the city of Santa Cruz, and was wholly invalid and void.

IX.

Denies that said bonds and coupons, or said bonds or coupons, were or are in the form described in the said or any notice
21 of the or any special election of March 13, 1894, or of any other date or day, and denies that any notice of such or any special election containing any description whatever of either said bonds or coupons was ever made, given, or published.

X.

Denies that on or about the thirteenth day of April, 1894, or at any other time, or at all, the said defendant, by its officers, or otherwise, for value received, or otherwise, delivered the said three hundred (300) and sixty (60) bonds, or any bonds, of the city of Santa Cruz, with the coupons thereunto attached, or otherwise, to one Walter Stanton, or to any person whomsoever; and defendant in this behalf alleges that, on or about the twenty-third day of April, 1894, three hundred and sixty (360) documents, signed as in this answer above alleged, and purporting to be refunding bonds of the city of Santa Cruz, with interest coupons thereto attached, were by one Walter Stanton stolen, taken, and carried away from the city clerk of the city of Santa Cruz, and defendant verily believes, and upon its information and belief alleges, that the purported bonds and coupons of Santa Cruz set forth in plaintiff's complaint are a portion of the said documents so stolen, as aforesaid.

XI.

Defendant has no information on the subject sufficient to enable it to answer the allegation that "one Walter Stanton afterwards, and before the maturity thereof, sold and delivered to the
22 plaintiff herein the nine bonds of the first series, numbered from one to nine, both inclusive, and two hundred and eighty-two of the coupons maturing on April 15, 1895," and therefore, upon that ground, denies that Walter Stanton, afterwards or before the maturity thereof, or at all, sold or delivered to the plaintiff herein the nine bonds, or any bonds, of the first or of any series, numbered from one to nine, both inclusive, or otherwise, and denies that said Walter Stanton, at the same time or at any time, sold or delivered to plaintiff two hundred and eighty-two of the coupons, or any coupons, or coupon, maturing on April 15, 1895, or at any time or at all.

XII.

Defendant has no knowledge or information on the subject sufficient to enable it to answer the allegation "that the said plaintiff ever since has been, and now is, the lawful owner and holder of the said nine bonds and the said two hundred and eighty-two coupons," and placing its denial on that ground, defendant denies that said plaintiff ever since has been and now is, or ever since has been, or now is, or ever has been or is, the lawful owner and holder, or the lawful owner or holder, or the owner or holder of said nine bonds, or any bonds or bond, or of the said two hundred and eighty-two coupons, or any coupons or coupon, of the said city of Santa Cruz.

XIII.

Denies that there is now, or at any time was or has been, either due or unpaid to the plaintiff, on said bonds or coupons, the sum of twenty-three thousand one hundred dollars, or any sum or
23 sums whatever, in gold coin of the United States of America, or otherwise, either with interest thereon from the said fifteenth day of April, 1895, or from any other day or date, or at all, and denies that said bonds, or any thereof, or any interest thereon, is or ever has been, due or payable to the said plaintiff, or to any other person or persons whomsoever.

Second.

For a further and separate answer and defense to plaintiff's amended complaint herein, defendant alleges:

That at the time of the alleged election on the question of refunding the outstanding indebtedness of the city of Santa Cruz, as set forth in the plaintiff's amended complaint, said city of Santa Cruz had no outstanding indebtedness, warrants thereof evidenced either by bonds, or which was either due or payable, or subject to refunding.

Third.

For a further and separate answer and defense to plaintiff's amended complaint herein, defendant alleges:

I.

That at the time of the alleged election on the question of refunding the outstanding bonded indebtedness of the city of Santa Cruz, as set forth in the plaintiff's amended complaint herein, the total outstanding indebtedness of the said city of Santa Cruz, which was evidenced by regularly issued and valid bonds and warrants thereof, was thirty-nine thousand dollars, and no more, no part of which was at that time either due or payable.

24 II.

That at said alleged election, the question submitted to the people who were in any way informed thereof was to refund the following alleged obligations of the city of Santa Cruz, namely:

Four hundred and fifty bonds of the denomination of $500 each, dated January 16, 1889, bearing interest at the rate of five per cent. per annum, issued by said city of Santa Cruz, for the purchase and construction of city water works; also eighty-nine first mortgage bonds of the denomination of $1,000 each, issued by a *probate* corporation known as the City Water Company of Santa Cruz, dated May 1, 1890, and bearing interest at the rate of six per cent. per annum; also certain municipal improvement bonds for the aggregate sum of $39,000.

II.

That all of said four hundred and fifty bonds of the denomination of $500 each were and each of them was invalid and void.

III.

That all and each of the bonds last hereinabove mentioned were and was executed, issued, sold, and delivered after the act of the legislature of the State of California authorizing their execution, issuance, sale and delivery, had been repealed, namely, after the nineteenth day of March, 1889.

IV.

That at the time of the execution, issuance, sale, and delivery of said last-mentioned bonds, the sum thereof, namely, $225,000, was in excess of five per cent. upon the assessed value of all the real and personal property of said city of Santa Cruz, and the sum thereof was in excess of the amount of indebtedness which the city of Santa Cruz might lawfully incur at the time of the execution, issuance, sale, and delivery thereof, for the purpose for which said bonds were issued, namely, for public improvements.

V.

That said eighty-nine so-called mortgaged bonds, of the denomination of $1,000 each, were, and each of them was, without right and without authority, issued by a private corporation known as the City Water Company of Santa Cruz, upon a pretended mortgage, executed without right or authority, by said private corporation, upon municipal property of the city of Santa Cruz, and no part of the sum of said so-called first-mortgage bonds, or of said mortgage, is or ever was a part of the municipal indebtedness of the city of Santa Cruz, and no part thereof was ever evidenced by bonds or warrants of the city of Santa Cruz.

VI.

That on February 26, 1894, the mayor and common council of the city of Santa Cruz passed and approved an alleged ordinance designated and known as "ordinance No. 314 of the city of Santa Cruz," purporting to provide for the submission to the electors of the city of Santa Cruz of the question of refunding the outstanding indebtedness of said city of Santa Cruz, at an election to be held on

March 13, 1894, by the terms of which said ordinance it was
26 provided and required that at such election the propositions to refund the invalid and void obligations, in this separate answer and defense above mentioned, be so joined and united with the propositions to refund the legitimate obligations of said city of Santa Cruz that no elector of the city of Santa Cruz could, at such election, vote for or against any of said propositions without voting for or against all of said propositions by a single mark on his ballot, which mark the said alleged ordinance required to be placed in a square opposite the word "Yes" or in a square opposite the word "No" on such ballot, and said alleged ordinance No. 314 prohibited and prevented any elector and all electors, at such election, from voting in favor of refunding the legitimate obligations of said city of Santa Cruz, and against refunding all or any of the aforesaid invalid, void, and pretended obligations thereof.

VII.

That on the twenty-sixth day of February, 1894, the mayor and common council of the city of Santa Cruz adopted an ordinance known and designated as ordinance No. 315 of the city of Santa Cruz, by the terms of which the city clerk of the city of Santa Cruz was authorized, directed, and ordered to cause to be published in the "Santa Cruz Surf," a daily newspaper published in said city of Santa Cruz, and in the "Santa Cruz Daily Sentinel," a daily newspaper published in said city of Santa Cruz, for not less than ten days before the thirteenth day of March, 1894, a notice of a special election to be held in said city of Santa Cruz on the thirteenth day of March,
1894, on the question of refunding the outstanding indebted-
27 ness of the city of Santa Cruz, and said ordinance by its terms prescribed the form of such notice.

VIII.

That the said city clerk of the city of Santa Cruz wholly failed and neglected to cause said or any notice of said election to be published as required, ordered and directed by said ordinance in said "Santa Cruz Surf" or in said "Santa Cruz Daily Sentinel," or in any newspaper, or in any manner whatever, and no notice of said election was ever published in said "Santa Cruz Surf" or in said "Santa Cruz Daily Sentinel," or in any other newspaper, or at all.

IX.

That by reason of the failure of said city clerk to cause the notice of said election to be published as prescribed in said ordinance No. 315, a very large number, namely, more than one-half of the then qualified electors of said city of Santa Cruz, failed to attend said election, and failed to vote at said election.

X.

That no election was, on the thirteenth day of March, 1894, or at any other time, or at all, held or conducted in the city of Santa

Cruz on the question of refunding the outstanding indebtedness, or any indebtedness, of said city.

XI.

That, as defendant is informed and believes, plaintiff herein, at and before the time of the alleged purchase by him of the
28 so-called bonds and coupons sued upon in this action, well knew and had full knowledge and notice of all the facts in this separate answer and defense set forth.

Fourth.

For a further and separate answer and defense to plaintiff's amended complaint herein, defendant alleges:

I.

That the said three hundred and sixty alleged bonds or obligations of the city of Santa Cruz described in plaintiff's amended complaint herein, together with the alleged coupons thereto attached, including the nine alleged bonds and the two hundred and eighty-two alleged coupons sued upon by plaintiff herein, were, and each of them was, on the twenty-third day of April, A. D. 1894, by one Walter Stanton willfully, unlawfully, and feloniously taken, stolen, and carried away from the possession of the city clerk of the said city of Santa Cruz, and that the said city of Santa Cruz received no consideration whatever therefor.

II.

That defendant is informed and believes, and upon its information and belief states the fact to be, that at and before the time of the alleged sale and delivery of the said nine alleged bonds and the said two hundred and eighty-two alleged coupons to the said plaintiff by the said Walter Stanton, that the said plaintiff well knew and had full knowledge and notice of the fact that the said alleged bonds and the said alleged coupons, and each and every of them, had been so stolen as aforesaid by the said Stanton from the
29 said city of Santa Cruz, and that the said city of Santa Cruz had received no consideration whatever therefor.

Fifth.

For a further and separate answer and defense to plaintiff's amended complaint herein, defendant alleges:

I.

That at all times during the year 1894, up to and including the sixteenth day of April, 1894, the assessed value of all the taxable real estate and personal property in said city of Santa Cruz was $3,907,404, and no more.

II.

That at all times during the year 1894, up to and including the sixteenth day of April, 1894, the said city of Santa Cruz had out-

standing municipal indebtedness evidenced by the bonds c
city to the amount and sum of two hundred and seventy tho
dollars.

III.

That all of said outstanding municipal indebtedness of sa
of Santa Cruz had been incurred for public improvement c
city, and no part thereof was incurred for any other purpose
ever.

IV.

That the pretended issue of three hundred and sixty so-cal
funding bonds of the par value of one thousand dollars each
sixteenth day of April, 1894, as set forth in the plaintiff's com
was an unlawful attempt without authority on the part of the
and common council of the city of Santa Cruz to increa
30 bonded indebtedness of said city beyond the limit of
per cent. upon the assessed value of all the taxable real
and personal property in said city, as prescribed and fixed
laws of the State of California.

V.

That said pretended issue of three hundred and sixty so-
refunding bonds, of the par value of one thousand dollars ea
the sixteenth day of April, 1894, as set forth in plaintiff's com
and every part and portion of said pretended bond issue, an
and every pretended bond thereof, is, and at all times has
an attempted overissue of municipal bonds of the city of
Cruz.

VI.

That as defendant is informed and believes, the plaintiff
at the time of his alleged purchase of the so-called bonds and co
sued upon in this action, had full knowledge and notice tha
pretended bonds and coupons, and each and all of them, const
an unauthorized and unlawful overissue of the municipal bo
the city of Santa Cruz.

Sixth.

For a further and separate answer and defense to plai
amended complaint herein, defendant alleges:

I.

That the so-called refunding bonds sued upon in this actio
particularly described in plaintiff's complaint, were n
31 by the city of Santa Cruz, or by the governing body o
city, or by any officer or person representing said ci
their face value in United States gold coin, or for not less tha
face value in United States gold coin, or for any value or s
consideration whatever, either in gold coin or otherwise, to
Stanton, or to any other person.

II.

That said so-called bonds and the coupons thereto attached, and each and all of them, were and was fraudulently taken by one Walter Stanton from the custody of the city clerk of the city of Santa Cruz, on or about the twenty-third day of April, 1894, and then and there by him, the said Walter Stanton, appropriated to his own use.

III.

That no consideration whatever was at any time given to the city of Santa Cruz for said bonds, or for any of them, by said Walter Stanton, or by any other person.

IV.

That, as defendant is informed and believes, the plaintiff herein, at the time of his alleged purchase of the so-called bonds and coupons sued upon in this action, had full knowledge and notice that said pretended bonds and coupons were not sold by the city of Santa Cruz for their face value, or for not less than their face value in United States gold coin, and plaintiff at said time had full knowledge and notice that said Walter Stanton had fraudulently taken said bonds and coupons and each and all of them,
32 from the custody of the city clerk of the city of Santa Cruz, and that said city of Santa Cruz had never received any consideration whatever for said bonds or coupons, or for any of them.

Wherefore, defendant prays that plaintiff take nothing by this action, and that defendant be hence dismissed with its costs.

LINDSAY & CASSIN,
Attorneys for Defendant.

JAMES G. MAGUIRE,
E. R. TAYLOR, *Of Counsel.*

STATE OF CALIFORNIA, } ss:
County of Santa Cruz, }

H. H. Clark, being duly sworn, says: That he is the duly elected, qualified and acting mayor of the defendant corporation, City of Santa Cruz, in the above entitled action; that he has read the foregoing answer to the plaintiff's amended complaint, and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters, he believes it to be true.

H. H. CLARK.

Subscribed and sworn to before me this fifth day of September, 1896.

[SEAL.] EDWARD R. SHIRRAN,
Notary Public in and for the County of Santa Cruz, State of California.

33 I hereby certify that I have read the foregoing answer, and in my opinion it presents good and sufficient defenses to the causes of action set forth in plaintiff's amended complaint.

San Francisco, September 7, 1896.

JAMES G. MAGUIRE,
Of Counsel for Defendant.

(Endorsed:) Service by copy of the within answer is hereby admitted this seventh day of September, 1896. Chickering, Thomas & Gregory, attorneys for plaintiff.

(Endorsed:) Filed September 7, 1896. W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk.

In the Circuit Court of the United States in and for the Ninth Circuit, Northern District of California.

ALBERT H. WAITE
vs.
CITY OF SANTA CRUZ.

Stipulation Waiving Jury.

A jury trial in the above-entitled action is hereby waived.

CHICKERING, THOMAS & GREGORY,
Attorneys for Plaintiff.
JAMES G. MAGUIRE,
LINDSAY & CASSIN, *Attorneys for Defendant.*

34 (Endorsed:) Filed June 1, 1897. W. J. Costigan, clerk.

In the Circuit Court of the United States in and for the Ninth Circuit, Northern District of California.

ALBERT H. WAITE, Plaintiff,
vs.
THE CITY OF SANTA CRUZ, Defendant. } No. 12094.

Findings of Fact and Conclusions of Law.

The court, upon consideration of the evidence herein, finds the following facts:

1. That all of the bonds and coupons referred to in the amended complaint were, prior to the commencement of this action, duly assigned to the plaintiff, and that the plaintiff was, at the date of the commencement of this action, the holder of the legal title to all said bonds and coupons.

2. That the plaintiff did not pay any money consideration for the assignment to him of any of said bonds or coupons, but all of said bonds or coupons were assigned to plaintiff for collection only.

3. The Northern Counties Investment Trust Company, Limited, is the real owner of three of the coupons upon which this action is brought, and were attached to bonds numbered *numbered*
35 181, 182, and 183, dated April 16, 1894. Said Northern Counties Investment Trust Company, Limited, at and prior

to the time of becoming owner of said bonds, had notice that the same had been illegally issued by the city of Santa Cruz for the purpose of refunding and taking up certain bonded indebtedness of the City Water Company of Santa Cruz.

4. That the defendant was, at all of the times referred to in the complaint, and still is, a municipal corporation of the fifth class, organized and existing under and by virtue of a certain statute of the State of California, approved March 1, 1866, entitled "An act to incorporate the town of Santa Cruz," and an act supplemental thereto, approved March 11, 1878, and entitled "An act to reincorporate the city of Santa Cruz."

5. That on March 13, 1894, the defendant had an outstanding bonded indebtedness of $271,000, or thereabouts, and on said day the assessed valuation of all the taxable real estate and the personal property in said city was $3,907,404; that on said date there was submitted to the qualified electors of the defendant corporation at a special election called and held for that purpose, under and in pursuance of ordinance No. 314 of the defendant city, dated February 26, 1894, and in accordance with the notice stated in finding No. 6, the question of refunding the said outstanding indebtedness of the said defendant, as then evidenced by the bonds thereof; and the further question of refunding eighty-nine first-mortgage bonds, with interest thereon from November 1, 1893, of a certain corporation, to wit, the City Water Company of Santa Cruz, and which were separately described in said ordinances Nos. 314 and
36 315 as a portion of the bonded indebtedness of the defendant. Said bonds of the City Water Company of Santa Cruz being each of the denomination of $1,000, and each bearing interest at the rate of six per cent. per annum, payable semi-annually, and secured by a mortgage or deed of trust upon the City Water Works of Santa Cruz, theretofore purchased by the defendant city from the said City Water Company of Santa Cruz.

6. Ordinance No. 315 of said defendant city, dated February 26, 1894, provided for the notice to be given of said election referred to in finding No. 5, and directed the city clerk to cause to be published in the "Santa Cruz Surf" and "Santa Cruz Sentinel," for not less than ten days before the thirteenth day of March, 1894, the notice of said special election, and to post said notice at each place of election in said city; said ordinance further provided that the notice so to be published and posted should be substantially in the words and figures set out in said ordinance, and should contain, among other things, a recital of the indebtedness to be refunded, as set forth in the ordinance referred to in finding No. 5, together with the denomination, character, time of payment, rate of interest, as well as all other details of the bonds proposed to be issued, and all of which matters were fully set forth and stated in the ordinance No. 315 of said defendant, together with notice that the polls of such election would be opened at sunrise in the morning of said day of election, and should close at five o'clock p. m. of the same day, and at said election, held on March 13, 1894, the polls were opened and
37 closed at the hours named in said ordinance, and more than two-thirds of the qualified electors of the said defendant

voted in favor of refunding the then outstanding bonded indebtedness of the said defendant, and also the refunding of the said eighty-nine first-mortgage bonds theretofore issued by the said corporation, the City Water Company of Santa Cruz.

7. That the only notice given of said election was the publication by the clerk of said defendant city of said ordinance No. 315, referred to in the preceding finding, in the papers named in said ordinance No. 315, and for the length of time therein prescribed, and posting the copies of said ordinance at each place of election in said city, and for the length of time prescribed in said ordinance.

8. On the twenty-sixth day of March, 1894, ordinance No. 320 was duly enacted by the mayor and common council of the defendant, and which ordinance provided for refunding the bonded indebtedness of the city of Santa Cruz and issuing bonds therefor, in accordance with the will of the electors of defendant, as expressed at the election referred to in finding No. 6, section 1 of said ordinance providing, among other matters:

"There shall be issued by the city of Santa Cruz three hundred and sixty (360) bonds of the denomination of one thousand (1,000) dollars each, bearing interest at the rate of five per cent. per annum, payable annually. Said bonds shall be of the character known as 'serials,' and shall be payable, principal and interest, in gold coin of the United States, in the manner following:

"One-fortieth part of the principal of the indebtedness to
38 be incurred shall be payable annually, to wit, the sum of $9,000, together with the annual interest on all sums of said indebtedness then unpaid, until the whole amount of said indebtedness is paid. The bonds to be issued shall be numbered consecutively from one to three hundred and sixty, both inclusive, and shall be divided into forty series, to be numbered consecutively from one to forty, both inclusive, and consisting of nine bonds each. The first series shall include those bonds which are numbered from one to nine, both inclusive, and each succeeding series shall include nine bonds which are numbered consecutively after those included in the next preceding series. The bonds included in the first of said series shall be payable on the fifteenth day of April, A. D. 1895, and all of the remaining series shall be made payable, one series in each year, in consecutive order on the fifteenth day of April in each succeeding calendar year thereafter, until and including the year 1934.

"Said bonds shall be made payable to bearer, and shall bear date of the sixteenth day of April, 1894, and shall be signed by the mayor and city clerk, and shall have affixed thereto the seal of the city of Santa Cruz.

"To each of said bonds there shall be attached interest coupons, equal in number to the number of years which the bond has to run before its maturity.

"Each of said coupons shall represent one year's interest upon the principal amount of the bond, at the rate of five per cent. per annum, viz., fifty dollars, and one of said coupons shall be payable on the fifteenth day of April in each calendar year. Each
39 coupon shall be made payable to bearer, and must bear the lithographed signatures of the mayor and city clerk."

And said section further provided that each of said bonds should contain the following recital:

"This bond is one of a series of bonds of like date, tenor, and effect, issued by the said city of Santa Cruz for the purpose of refunding the bonded indebtedness of said city and issuing bonds therefor, and providing for the payment of the same, under and in pursuance of and in conformity with the provisions of an act of the legislature of the State of California, 'An act to amend an act entitled "An act authorizing the common council, board of trustees, or other governing body of any incorporated city or town, other than cities of the first class, to refund its indebtedness, issue bonds therefor, and provide for the payment of the same" (approved March 15, 1883),' approved March 1, 1893, and in pursuance of and in conformity with the constitution of the State of California and the ordinances of the city of Santa Cruz, and in pursuance of and in conformity with a vote of more than two-thirds of all the qualified electors of said city of Santa Cruz, voting at a special election, duly and legally called and held and conducted in said city, as provided under said act, on Tuesday, the thirteenth day of March, 1894, notice thereof having been duly and legally given and published, in the manner as required by law, and after the result of said election had been duly canvassed, found, and declared in the manner and as required by law.

"And it is hereby certified and declared that all acts, con-
40 ditions, and things required by law to be done precedent to and in the issue of said bonds, have been properly done, happened, and performed in legal and due form and as required by law."

It was further provided, by section 3 of said ordinance, that the city clerk of said defendant city should give notice by publication in certain papers named, for the period of fifteen days next preceding the sixteenth day of April, 1894, to the effect that said bonds were to be sold by said defendant city, and stating that "sealed bids for the purchase of said bonds, or any number thereof, will be received by the city clerk, on behalf of the mayor and common council of said city, at the office of the city clerk, in said city of Santa Cruz, from the first publication of said notice up to the hour of two o'clock p. m. on the sixteenth day of April, 1894, and that thereafter said bonds will be sold by the mayor and common council to the highest bidder for not less than their face value in United States gold coin, to be paid on delivery of said bonds at the city treasurer's office in said city of Santa Cruz."

Section 4 of said ordinance further provided:

"There shall be levied and collected annually, for the term of forty (40) years, by the proper authorities of the city of Santa Cruz, at the time of the levy and collection of the general taxes of the city of Santa Cruz, and in the same manner as for such levy and collection provided, a special tax sufficient to pay the annual interest as it falls due upon the portion of said bonds remaining unpaid,
41 and also sufficient to pay one-fortieth part of the principal of said bonds. The moneys so collected for the payment of the

principal sum of said bonds shall constitute a sinking fund for the payment of the principal sum of said bonds, as the same falls due, and with which said principal sum shall be paid as the same falls due, as follows, to wit:

Nine thousand dollars ($9,000) of such principal sum on the fifteenth day of April, 1895, and $9,000 of such principal sum on the fifteenth day of April of each year thereafter, until the whole of the principal sum of $360,000 is paid. And the said city of Santa Cruz shall and will pay said bonds and the interest thereon to the holders and owners thereof as the same falls due."

9. On April 11, 1892, Wm. T. Jeter was duly elected mayor of the defendant City of Santa Cruz, and J. Howard Bailey, J. F. Hoffmann, E. G. Green, and F. W. Lucas were, on the same day, duly elected members of the common council of said city, and the said persons so elected as mayor and members of the common council duly qualified for their respective offices within ten days after their said election, and duly entered upon the duties of their respective offices. Section 3 of an act of the legislature of the State of California, entitled "An act to reincorporate the city of Santa Cruz," approved March 11, 1876, provides that the mayor and common council of said city shall hold their offices for a term of two years, and until their successors are duly elected and qualified. On the ninth day of April, 1894, Robert Effey was duly elected as mayor of said defendant city to succeed William T. Jeter, and duly
42 qualified as such between the hours of eleven o'clock a. m. and two o'clock p. m. of April 16, 1894; and Messrs. Henry G. Ensell, John Howard Bailey, J. D. Maher, and Frank K. Roberts were, on April 9, 1894, duly elected members of the common council of said defendant city, and all of them duly qualified as such councilmen before the meeting of the common council of said city defendant held April 16, 1894. The persons so elected mayor and members of the common council on April 9, 1894, with the exception of J. Howard Bailey, who was re-elected councilman, did not actually enter upon their duties as such officers until May 7, 1894, and the said Wm. T. Jeter, J. Howard Bailey, J. F. Hoffmann, E. G. Green, and F. W. Lucas continued to act publicly as mayor and members of the common council of said defendant city until May 7, 1894, without protest from any person, and held seven meetings of said council between and including the date of April 16, 1894, and May 7, 1894.

10. On April 16, 1894, to which date the common council of said defendant city had regularly adjourned, the said Wm. T. Jeter, acting as mayor, and said J. Howard Bailey, F. J. Hoffmann, E. G. Green, and F. W. Lucas, being present and acting as the common council of the said city of Santa Cruz, and no bids having been received for the purchase of the refunding bonds issued by said city under and by virtue of ordinance No. 320, referred to in finding No. 8, the proposition of Coffin & Stanton to take all said bonds dated February 27, 1894, was accepted, upon the condition that they should furnish satisfactory security for the faithful performance

of the agreement contained in their said proposition. Said proposition was in the following words:

43 "The City of Santa Cruz deciding to refund $225,000 in five per cent. bonds, $89,000 in six per cent. mortgage bonds, $39,000 municipal improvement bonds, with accrued interest thereon, total $360,000 in five per cent. refunding bonds of the denomination of $1,000 each, legally issued under the act of the legislature of the State of California approved March 1, 1893, advertising the sale of same, and in the event of the city not securing satisfactory bids for such bonds at said sale, Coffin & Stanton agree to purchase said bonds at par and accrued interest, contracting with the city to assume all obligations of interest and principal on the bonds to be refunded, making the refunding an assured fact from the date of the sale and delivery of the bonds to them.

"The funds derived from the purchase of the $360,000 in said bonds to be deposited with Coffin & Stanton to the credit of the funding fund, and to be used to take up and refund the outstanding bonds as above mentioned, Coffin and Stanton forwarding same from time to time to the city for cancellation, charging such bonds to the funding fund at par (100), with interest to April 16 only.

"Coffin and Stanton also agree to surrender and deliver to the city all bonds of the City Water Company outstanding, over and above the $89,000 above mentioned, and to surrender and assign to and release said city from all claims and demands against said city of Santa Cruz, under their contract with said city for construction of water works.

"In consideration of the above agreement, the city on its
44 part agrees to pay Coffin and Stanton three per cent. on the par value of the refunding bonds in the event of the city availing itself of its terms, on or before April 16, 1894.

"Coffin and Stanton further agree to purchase and furnish said city with the blank bonds and coupons thereto at their own cost and expense.

"Dated at Santa Cruz, February 27, 1894.

"(Signed) COFFIN & STANTON.

"Witness to signature:
"Z. N. GOLDSBY."

11. On April 23, 1894, the said Wm. T. Jeter as mayor, and the said Lucas, Bailey, Hoffman, and Green, as members of the common council, publicly met pursuant to adjournment of the common council, and, assuming to act as mayor and members of the common council of said defendant city, without protest or opposition from any one, accepted and approved a bond presented by the said Coffin & Stanton, for the faithful performance by them of their agreement contained in their proposition set out in the preceding finding, and directed the clerk of the said defendant city to deliver to Coffin & Stanton the refunding bonds referred to in the complaint in this action, and all of said bonds were in accordance with such direction, delivered to Coffin & Stanton, of April 24, 1894.

12. All of the assignors of plaintiff, other than the one referred to in finding No. 3, and E. G. & E. Wallace, who purchased certain of the refunding bonds and coupons sued on under the circumstances hereinafter set forth in this finding, were *bona fide* purchasers of the bonds and coupons assigned by them to plaintiff, and sued on
45 in this action, and were without notice of any fact tending to impeach the truth of the recitals in said bonds; and in relation to E. G. & E. Wallace, from whom plaintiff derives the legal title to the remaining bonds and coupons sued on, the court finds that on or about September 22, 1894, E. G. & E. Wallace, assignors of plaintiff, purchased from Coffin & Stanton 150 of the said bonds and coupons referred to in the preceding finding, including eight of the bonds and coupons sued on in this action, giving in exchange therefor 435 shares of the stock of the Page Belting Company, and $116,400 in cash. Said purchase and exchange was made by the firm of F. H. Prince & Co., acting as agents of E. G. & E. Wallace, and also acting for Coffin & Stanton, in the same transaction. The firm of F. H. Prince & Co. received from E. G. & E. Wallace for services as their agents in effecting the sale of the stock of the Page Belting Company, the sum of two thousand five hundred dollars, and said Coffin & Stanton agreed to compensate said F. H. Prince & Co. for their services rendered to them in the same transaction by a division of all profits which should be realized by said Coffin & Stanton, upon the resale of the said shares of stock of the Page Belting Company. At the time of the said sale of the refunding bonds of the defendant city to E. G. & E. Wallace, the said F. H. Prince & Co. had notice of all matters recited in the ordinances of defendant, numbered 314, 315, and 320, hereinbefore referred to in the preceding findings. The said F. H. Prince & Co. did not communicate their said knowledge to E. G. & E. Wallace, and the said E. G.
46 & E. Wallace had no actual knowledge or actual notice of any of said matters, nor actual notice of any fact tending to impeach the truth of the recitals contained in said bonds—and unless the notice to F. H. Prince & Co. is to be imputed as notice to them, the said E. G. & E. Wallace had no constructive notice of the facts recited in said ordinances, or of any fact tending to impeach the truth of the recitals contained in said bonds.

13. That all of the bonds and coupons sued on were in the form alleged and set out in the complaint, and bore date and were signed and attested in the form and upon the date and by the persons alleged in the complaint, but some of said bonds were signed by Wm. T. Jeter on April 16, 1894, after the qualification of his successor in the office of mayor.

14. That all of the bonds and coupons sued on matured April 15, 1895, and no part of the same has been paid.

15. Coffin & Stanton never complied with their agreement set out in finding No. 10, and upon which the bonds and coupons were delivered to them, and the defendant City of Santa Cruz never received any consideration on account of the issuance of said bonds, other than the promise of Coffin & Stanton to assume the payment of the bonds mentioned in their said agreement.

Conclusions of Law.

As conclusions of law from the foregoing facts, the court finds:

That Wm. T. Jeter was the *de facto* mayor of the defendant City of Santa Cruz on the sixteenth day of April, 1894, and so con-
47 tinued to be until May 7, 1894; and that he and the persons who assumed to act as members of the common council of defendant on the sixteenth and twenty-third days of April, 1894, to wit, J. H. Hoffmann, E. G. Green, and F. W. Lucas, were on those days the *de facto* mayor and the *de facto* members of the common council of the defendant city; and J. H. Bailey, who also acted as a member of its common council on said days, was a *de jure* member of such common council; and that the bonds and coupons sued on are upon their face valid obligations of the defendant.

2. That E. G. & E. Wallace were *bona fide* purchasers of the bonds and coupons assigned by them to plaintiff, without notice of the facts recited in the ordinances of the defendant, numbered 314, 315, and 320; and without notice of any fact tending to impeach the truth of the recitals contained in said bonds.

As a general conclusion from the foregoing facts and conclusions of law, the court finds that the plaintiff is not entitled to recover upon the three coupons assigned to him by the Northern Counties Investment Company, Limited, and is entitled to recover as against the defendant on all the other bonds and coupons assigned to him, a judgment in the sum of $22,950, and interest thereon from April 15, 1895, and costs of suit.

Let such judgment be entered.

Dated September 29, 1898.

JOHN J. DE HAVEN, *Judge.*

(Endorsed:) Filed September 29, 1898. Southard Hoffman, clerk, by W. B. Beaizley, deputy clerk.

48 In the Circuit Court of the United States in and for the Ninth Circuit, Northern District of California.

ALBERT H. WAITE, Plaintiff,
vs.
CITY OF SANTA CRUZ, Defendant. } No. 12094.

Additional Findings of Facts, etc.

On the twenty-eighth day of November, A. D. 1898, the motions of defendant for a new trial of said action and for additional findings of fact, came on regularly to be heard before the court, Messrs. Chickering, Thomas & Gregory appearing as attorneys for the plaintiff, and Messrs. Lindsay & Cassin, James G. Maguire and John Garber appearing as attorneys for the defendant; and, the court having heard arguments thereon, and being fully advised in the premises,

It is now ordered, that defendant's motion for a new trial of said

cause be, and the same is hereby denied; and it appearing to the court proper that additional findings of fact should be made, in order to set forth with more particularity the matters embraced in the original finding of facts filed herein on September 29, 1898, the court now finds the following facts:

1. Ordinance No. 314 of the defendant City of Santa Cruz, referred to in finding No. 5 of the original findings filed herein, is in the words and figures following, to wit:

49 "*Ordinance No.* 314.

"An ordinance calling a special election and submitting to the qualified electors of the city of Santa Cruz the question of refunding the bonded indebtedness of said city, issuing bonds therefor, and providing for the payment of the same.

"Whereas, the city of Santa Cruz has an outstanding indebtedness evidenced by the bonds of said city, as follows:

"Four hundred and fifty (450) bonds (with interest thereon from January 15, 1894), dated January 15, 1889, of the denomination of $500 each, bearing interest at the rate of five per cent. per annum, payable annually, issued by said city of Santa Cruz, under the provisions of an act of the legislature of the State of California, entitled, 'An act authorizing the incurring of indebtedness by cities, towns, or municipal incorporations, incorporated under the laws of this State,' approved March 15, 1887, which said bonds were heretofore sold by said city and the proceeds thereof used by said city in the purchase and construction of the city water works.

"2. Eighty-nine (89) first-mortgage bonds (with interest thereon from November 1, 1893) of the corporation, the City Water Company of Santa Cruz, heretofore issued by said corporation, the City Water Company of Santa Cruz, which bonds bear date May 1, 1890, and are of the denomination of one thousand (1,000) dollars each, and bear interest at the rate of six (6) per cent. per annum, payable semi-annually, and are secured by a mortgage or deed of trust upon the property known as the city water works of Santa Cruz,
50 executed by the City Water Company of Santa Cruz, as party of the first part therein, to the Holland Trust Company of New York, as trustee, party of the second part therein; and which said bonds outstanding were, at the time of the conveyance by the City Water Company, of Santa Cruz, to the city of Santa Cruz, of the property known as the city water works, and now are, a valid lien and charge upon the said property known as the city water works, and became thereby a part of the bonded indebtedness of the city of Santa Cruz, and

"3. Sixty-five (65) municipal improvement bonds (with interest thereon from January 3, 1894), dated September 3, 1887, of the denomination of five hundred (500) dollars and twenty-six (26) municipal improvement bonds (with interest thereon from January 3, 1894), dated September 3, 1887, of the denomination of two hundred and fifty (250) dollars each, all bearing interest at the rate of five (5) per cent. per annum, payable annually, issued by said city

of Santa Cruz, and under and by virtue of a certain act of the legislature of the State of California, entitled 'An act authorizing the incurring of indebtedness by cities, towns, or municipal incorporations incorporated under the laws of this State,' approved March 15, 1887.

"And whereas, the common council of said city of Santa Cruz deem it for the best interests of said city of Santa Cruz to refund such indebtedness under the provisions of an act of the legislature of the State of California, entitled, 'An act to amend an act entitled,

"An act to authorize the common council, the board of trus-
51 tees, or other governing body of any incorporated city or town other than cities of the first class, to refund this indebtedness, issue bonds therefor, and provide for the payment of the same," approved March 15, 1883,' approved March 1, 1893.

"Now, therefore, the mayor and common council of the city of Santa Cruz do ordain as follows, to wit:

"SECTION 1. That a special election in and for the city of Santa Cruz, county of Santa Cruz, State of California, is hereby called, and will be held in said city, on Tuesday, the thirteenth day of March, A. D. 1894, at which there will be submitted to the qualified electors of said city the question of refunding the bonded indebtedness of said city and issuing bonds therefor, and providing for the payment of the same.

"SECTION 2. The indebtedness of said city, which it is proposed to refund, is as follows:

"1. Four hundred and fifty (450) bonds (with interest thereon from January 15, 1894), dated January 15, 1889, of the denomination of five hundred (500) dollars each, bearing interest at the rate of five (5) per cent. per annum, payable annually, issued by said city of Santa Cruz, under the provisions of an act of the legislature of the State of California, entitled 'An act authorizing the incurring of indebtedness by cities, towns, or municipal incorporations, incorporated under the laws of this State,' approved March 15, 1887, which said bonds were heretofore sold by said city and the proceeds thereof used by the said city in the purchase and construction of the city water works.

52 "2. Eighty-nine (89) first-mortgage bonds (with interest thereon from November 1, 1893,) of the corporation, the City Water Company of Santa Cruz, heretofore issued by said corporation, the City Water Company of Santa Cruz, which bonds bear date May 1, 1890, and are of the denomination of one thousand (1,000) dollars each, and bear interest at the rate of six (6) per cent. per annum, payable semi-annually, and are secured by a mortgage or deed of trust upon the property known as the city water works of Santa Cruz, executed by the City Water Company of Santa Cruz, as party of the first part therein, to the Holland Trust Company of New York, as trustee, party of the second part therein, and which said bonds outstanding were, at the time of the conveyance by the City Water Company of Santa Cruz to the city of Santa Cruz of the property known as the city water works, and now are a valid lien and charge upon said property known as the city water works, and

became thereby a part of the bonded indebtedness of the city of Santa Cruz.

"3. Sixty-five (65) municipal improvements bonds (with interest thereon from January 3, 1894), dated September 3, 1887, of the denomination of five hundred (500) dollars each, and twenty-six (26) municipal improvement bonds (with interest thereon from January 3, 1894), dated September 3, 1887, of the denomination of two hundred and fifty (250) dollars each, all bearing interest at the rate of five (5) per cent. per annum, payable annually, issued by said city of Santa Cruz, under and by virtue of a certain act of the legislature of the State of California, entitled, 'An act authorizing the in-
53 curring of indebtedness by cities, towns, or municipal incorporations, incorporated under the laws of this State,' approved March 15, 1887.

"The denomination, character, time of payment, rate of interest, as well as all other details of the bonds proposed to be issued for the refunding of said indebtedness, are as follows:

"The bonds to be issued shall be three hundred and sixty (360) in number, of the denomination of one thousand (1,000) dollars each; they shall bear interest at the rate of five (5) per cent. per annum, payable annually. They shall be of the character known as 'serials,' and shall be payable, principal and interest, in gold coin of the United States, in the manner following:

"One-fortieth ($\frac{1}{40}$) part of the principal of the bond indebtedness to be incurred in the issuing of said bonds shall be payable annually, to wit, the sum of nine thousand (9,000) dollars, together with the annual intersst on all sums of said indebtedness then unpaid, and said principal and interest shall be payable each and every year on a day to be fixed by the mayor and common council of said city, until the whole amount of said indebtedness is paid. The bonds to be issued shall be numbered consecutively from one (1) to three hundred and sixty (360), both inclusive, and shall be divided in forty series, to be numbered consecutively from one (1) to forty (40), both inclusive, and consisting of nine (9) bonds each. The first series shall include those bonds which are numbered from one (1) to nine (9), both inclusive, and each succeeding series
54 shall include the nine (9) bonds which are numbered consecutively after those included in the next preceding series.

"The bonds included in the first of said series shall be made payable on the fifteenth day of April, A. D. 1895, and all of the remaining series shall be made payable in consecutive order on the fifteenth day of April, in each succeeding calendar year thereafter, until and including the year 1934.

"Said bonds shall be made payable to bearer, and shall bear date the sixteenth day of April, 1894, and shall be signed by the mayor and city clerk, and shall have affixed thereto the seal of the city of Santa Cruz. To each of said bonds, there shall be attached interest coupons, equal in number to the number of years which the bond has to run before its maturity. Each of said coupons shall represent a year's interest upon the principal amount of the bond, at the rate of five (5) per cent. per annum, viz., fifty (50) dollars, and shall

be payable on the fifteenth day of April of each calendar year. Each coupon shall be payable to bearer, and must bear the lithographic signatures of the mayor and city clerk.

"Said bond shall be substantially in the following form:

"UNITED STATES OF AMERICA, *State of California.*

"*Bond of the City of Santa Cruz.*

"No. —. Series —. $1,000.

"*Refunding Bond.*

"The City of Santa Cruz, a municipal corporation in the
55 county of Santa Cruz, State of California, is indebted to, and promises to pay to the bearer for value received, the sum of one thousand (1,000) dollars, gold coin of the United States, on the fifteenth day of April, A. D. ——, with interest thereon, in like gold coin, at the rate of five per cent. per annum, payable annually on the fifteenth day of April, of each calendar year from the date hereof, at the office of said city treasurer of Santa Cruz, on presentation and surrender of the proper interest-bearing coupon hereto attached.

"And for the payment of the principal sum herein named, and the interest accuing thereon, the said city of Santa Cruz is held and firmly bound, and its faith and credit and all the real and personal property of said city are hereby pledged for the prompt payment of this bond and interest at maturity.

"This bond is one of a series of bonds of like date, tenor, and effect, issued by the said city of Santa Cruz for the purpose of refunding the bonded indebtedness of the said city and issuing bonds therefor, and providing for the payment of the same, under and in pursuance of the same, and in conformity with the provisions of an act of the legislature of the State of California, entitled, 'An act to amend an act entitled "An act authorizing the common council, board of trustees, or other governing body of any incorporated city and town, other than cities of the first class, to refund its indebtedness, issue bonds therefor, and provide for the payment of the same" (approved March 15, 1883),' approved March 1, 1893.

"And in pursuance of and in conformity with the constitution of the State of California, and the ordinances of the city of Santa
56 Cruz, and in pursuance of and in conformity with a vote of more than two-thirds of all the qualified electors of said city of Santa Cruz, voting at a special election duly and legally called and held and conducted, in said city, as provided under said act, on Tuesday, the thirteenth day of March, 1894, notice thereof having been duly and legally given and published in the manner as required by law, and after the result of said election had been canvassed, found and declared in the manner and as required by law.

"And it is hereby certified and declared that all acts, conditions, and things required by law to be done precedent to and in the issue of said bonds, have been properly done, happened, and performed,

in legal and due form, as required by law. This bond ceases t
bear interest when due, unless presented for payment.

"In testimony whereof, the said City of Santa Cruz, by its mayo
and common council, has caused this bond to be signed by th
mayor of said city of Santa Cruz, and attested by its clerk, with th
seal of said city attached, this sixteenth day of April, A. D. 1894.

"——— ———,

"*Mayor of the City of Santa Cruz.*

"[SEAL.]

"Attest: ——— ———,

"*City Clerk.*"

The coupons attached to said bonds shall be substantially in th
following form:

57 "Refunding bond number —. Coupon number —.

"The City of Santa Cruz will pay to bearer hereof, on the fifteent
day of April, A. D. ——, at the office of the city treasurer of sai
city, fifty (50) dollars, gold coin of the United States, for interest o
bond No. —, issued sixteenth day of April, A. D. 1894.

"——— ———,

"*Mayor of the City of Santa Cruz.*

"——— ———,

"*City Clerk.*

"SECTION 3. Said bonds shall be sold in such manner as may b
provided by said common council, to the highest bidder, for not les
than their face value, in gold coin of the United States. The pro
ceeds of such sale shall be placed to the credit of funding fund, an
shall be applied only for the purpose of refunding the indebtednes
for which said bond shall have been issued.

"SECTION 4. In case it shall be determined to refund said bonde
indebtedness and issue bonds therefor, a sinking fund shall be create
for the payment of the principal of the bonds evidencing said in
debtedness of three hundred and sixty thousand (360,000) dollars
and interest thereon, as follows: The common council shall, at th
time of fixing the general tax levy for each year, and in the sam
manner for such tax levy provided, levy and collect annually each
year, sufficient money to pay one-fortieth part of the principal o
such indebtedness, and also the annual interest on the portion re
maining unpaid.

58 "SECTION 5. That the said clerk shall prepare for each elec
tion precinct or ward in the city not less than one hundre
(100) tickets for every fifty (50) or fraction of fifty (50) electors reg
istered in such ward, to be distributed to the qualified electors o
each ward as by law provided.

"The ballots to be used at said election shall be of the same char
acter as those prescribed by law to be used in other elections held
in such city of Santa Cruz, and have printed thereon the followin
caption and heading, setting forth the proposition to be voted upon
to wit: 'Municipal ticket'; underneath which shall be printed th

following: 'Proposition for refunding the bonded indebtedness of the city of Santa Cruz, to the aggregate amount of three hundred and sixty thousand (360,000) dollars, and issuing bonds therefor, and providing for the payment of the same;' underneath which shall be printed: 'To vote for or against refunding of the indebtedness, and providing for the payment of the same, stamp a cross (X) in the square to the right of and against the answer your desire to give;' underneath which shall be printed the following: 'For refunding the indebtedness, etc.,' to the right of which shall be printed two squares, the word 'Yes' in one square, with a blank square to the right of it, and the word 'No' in one square, with a blank square to the right of it.

"Qualified electors at said election desiring to assent to or accept the said proposition set forth in this ordinance of refunding the indebtedness of the city, issuing bonds therefor, and pro-
59 viding for the payment of the same, shall in voting stamp a cross (X) in a square to the right of the word 'Yes,' as printed upon said ballot. Qualified electors at said election desiring to reject said proposition, shall, in voting, stamp a cross in the square to the right of the word 'No,' as printed upon said ballot.

"SECTION 6. The special election hereby called shall be held and conducted, votes received and canvassed, and returns made, and results determined, according to the law governing municipal elections in this city, in the manner in which other elections are held in said city of Santa Cruz. The polls for such election shall be opened at sunrise in the morning of said day of election, and shall close at five o'clock p. m. of the same day.

"SECTION 7. The voting precincts, the places of election or polling places herein, are hereby established, created, and designated as nearly as possible the same as those so created and designated by said city council at and for the last municipal election held in said city on the eleventh day of April, 1892, and in accordance with law, and said voting precincts and polling places, respectively, and the officers to conduct said election in said city at each of said voting places, shall be, and they are hereby appointed and designated as follows, to wit:

"SECTION 8. The places for holding said election shall be as follows: In the first ward, at the Farmers' Union building, No. 195 Pacific avenue. In the second ward, at the St. Charles Hotel building, No. 13 Mission street. In the third ward, at the Young Men's Christian Association building, No. — Pacific avenue. In
60 the fourth ward, at Davis's building, northeast corner of Mission and Bay streets.

"SECTION 9. There are hereby appointed from the first ward: F. B. Curtis and Fred Barson as inspectors; F. P. Cooper and L. S. Harmon as judges; George A. Chittenden and Henry L. Carter as clerks; W. S. Fitch and George Birkenseer as ballot clerks of said election.

"For the second ward: Henry F. Kron and Peter R. Hines as inspectors; Edward Gilleran and U. S. Nichols as judges; Will E.

Grant and Edmund Jones as clerks; J. J. C. Leonard and Vincent Nolan as ballot clerks of said election.

"For the third ward: N. P. Ingalls, C. E. Huyck, as inspectors; John Morrow, W. M. Rennie, as judges; R. S. Miller, F. L. Stevens as clerks; T. J. Egan, Jos. M. Green, as ballot clerks of said election.

"For the fourth ward: Henry Schaw and A. Fridlay as inspectors; A. W. Bryant and W. H. Mason as judges; E. M. Silvey and J. B. Harris as clerks; L. L. Fargo and F. H. Carter as ballot clerks of said election.

"SECTION 10. The officers of election hereinbefore named and designated must, prior to entering upon their respective duties, each take the oath of office prescribed by law for such officers of State county, and municipal elections.

"In case any of the officers of election so designated and appointed shall fail to attend with, the qualified electors assembled shall fill their places by appointing other competent persons from among the qualified electors present.

61 "All returns of said special election shall be made out and signed by said officers of the special election, in the usual form, and deposited with the city clerk, as provided by law.

"SECTION 11. No person shall be entitled to vote at said election unless he be a qualified voter of the city of Santa Cruz.

"SECTION 12. If, upon the canvass of the returns of said election it shall be found that two-thirds of the voters thereat have voted in favor of refunding said indebtedness, issuing bonds therefor and providing for the payment of the same, then and thereafter said indebtedness shall be refunded, bonds issued therefor, and provision made for the payment of the same in the manner herein and as by law provided.

"SECTION 13. This ordinance shall take effect from and after its passage and approval.

"I hereby certify that the foregoing ordinance, No. 314, was passed and adopted by the city council of the city of Santa Cruz, at the meeting thereof held this twenty-sixth day of February, A. D. 1894, by the following votes: Ayes, Councilmen F. W. Lucas, J. Ho. Bailey, F. J. Hoffmann, E. G. Greene; noes, none; absent, none.

"O. J. LINCOLN,

"[SEAL.] *City Clerk of said City of Santa Cruz.*

"Approved this twenty-sixth day of February, A. D. 1894.

"WM. T. JETER, *Mayor.*

62 "Attest with the seal of said city:

"O. J. LINCOLN,

"[SEAL.] *City Clerk.*"

2. The original finding numbered 6 is amended so as to read as follows, to wit: 6. Ordinance No. 315, of said defendant city, dated February 26, 1894, provided for the notice to be given of said election referred to in finding No. 5, and directed the city clerk to cause to be published in the "Santa Cruz Surf" and "Santa Cruz Sentinel,"

for not less than ten days before the thirteenth day of March, 1894, the notice of said special election, and to post said notice at each place of election in said city; said ordinance further provided that the notice so to be published and posted should be substantially in the words and figures set out in said ordinance, and should contain, among other things, a recital of the indebtedness to be refunded, as set forth in the ordinance referred to in finding No. 5, together with the denomination, character, time of payment, rate of interest, as well as all other details, of the bonds proposed to be issued, and all of which matters were fully set forth and stated in the ordinance No. 315, of said defendant, together with notice that the polls of such election would be opened at sunrise in the morning of said day of election, and should close at five o'clock p. m. of the same day, the said time fixed for closing the polls being one hour and fifteen minutes before sunset, and at said election held on March 13, 1894, the polls were opened and closed at the hours named in said ordinance,
63 and more than two-thirds of the qualified electors of the said defendant voting at said special election, voted in favor of refunding the then outstanding bonded indebtedness of the said defendant, and also the refunding of the eighty-nine first-mortgage bonds theretofore issued by the said corporation, the City Water Company of Santa Cruz, but less than one-half of the qualified electors of said defendant voted at said election. Said ordinance numbered 315 is in the words and figures following, to wit:

"*Ordinance No.* 315.

"Ordinance providing for notice to be given of a special election in the city of Santa Cruz, to be held March 13, 1894, for the purpose of submitting to the qualified electors of said city the question of refunding the bonded indebtedness of said city, issuing bonds therefor, and providing for the payment of the same.

"Whereas, the common council of the city of Santa Cruz deems it for the best interests of said city of Santa Cruz to refund the bonded indebtedness of said city hereinafter recited, under the provisions of an act of the legislature of the State of California entitled 'An act to amend an act entitled "An act to authorize the common council, board of trustees, or other governing body of any incorporated town or city, other than cities of the first class, to refund its indebtedness, issue bonds therefor, and provide for the payment of the same" (approved March 15, 1893),' approved March 1, 1893, and the mayor and common council of said city of Santa Cruz did, on the sixth day of February, 1894, pass an ordinance (No. 314) calling a special election of, in, and for said
64 city of Santa Cruz, to be held on the thirteenth day of March, 1894, for the purpose of submitting to the qualified electors of said city of Santa Cruz the question of refunding the bonded indebtedness of said city of Santa Cruz, issuing bonds therefor, and providing for the payment of the same, which said ordinance is hereby specially referred to and made a part hereof.

"Now, therefore, the mayor and common council of said city of Santa Cruz, do ordain as follows, to wit:

"SECTION 1. The city clerk is hereby directed and ordered to cause to be published in the 'Santa Cruz Surf' and 'Santa Cruz Daily Sentinel,' newspapers published and printed in said city of Santa Cruz, in the county of Santa Cruz, for not less than ten (10) days before the thirteenth day of March, 1894, a notice of said special election, and to cause to be posted at each place of election hereinafter mentioned, in said city, a notice of said special election, which said notice so published and posted, shall be substantially in the words and figures following, viz:

"*Notice of Special Election.*

"To the qualified electors of the city of Santa Cruz, and to all whom it may concern:

"Notice is hereby given that a special election has been duly and regularly called, and will be held in and for the city of Santa Cruz, on Tuesday, the thirteenth day of March, 1894, at which there will be submitted to the qualified electors of said city the question of refunding the following bonded indebtedness of said city of Santa Cruz, issuing bonds therefor and providing for the payment of the same, viz:

"(1.) Four hundred and fifty (450) bonds (with interest thereon from January 15, 1894), dated January 15, 1889, of the denomination of five hundred (500) dollars each, bearing interest at the rate of five (5) per cent. per annum, payable annually, issued by said city of Santa Cruz, under the provisions of an act of the legislature of the State of California, entitled, 'An act authorizing the incurring of indebtedness by cities, towns, or municipal incorporations, incorporated under the laws of this State,' approved March 15, 1887, and which said bonds were heretofore sold by said city and the proceeds thereof used by said city in the purchase and construction of the city water works.

65

"(2.) Eighty-nine (89) first-mortgage bonds (with interest thereon from November 1, 1893), of the corporation, the City Water Company of Santa Cruz, heretofore issued by said corporation, the City Water Company, of Santa Cruz, which bonds bear date May 1, 1890, and are of the denomination of one thousand (1,000) dollars each, and bear interest at the rate of six (6) per cent. per annum, payable semi-annually, and are secured by a mortgage or deed of trust upon the property known as the city water works of Santa Cruz, executed by the City Water Company of Santa Cruz, as party of the first part therein, to the Holland Trust Company, of New York, as trustee, party of the second part therein, and which said bonds outstanding, were, at the time of the conveyance by the City Water Company of Santa Cruz to the city of Santa Cruz of the property known as the city water works, and now are, a valid lien and charge upon said property known as the city water works, and became thereby a part of the bonded indebtedness of the city of Santa Cruz; and

66 "(3.) Sixty-five (65) municipal improvement bonds (with interest thereon from January 3, 1894), dated September 3, 1887, of the denomination of five hundred ($500) dollars, each, and twenty-six municipal improvement bonds (with interest thereon from January 3, 1894), dated September 3, 1887, of the denomination of two hundred and fifty ($250) dollars each, all bearing interest at the rate of five (5) per cent. per annum, payable annually, issued by said city of Santa Cruz, under and by virtue of a certain act of the legislature of the State of California, entitled 'An act authorizing the incurring of indebtedness by cities, towns, or municipal incorporations, under the laws of this State') approved March 15, 1887.

"The denomination, character, time of payment, rate of interest, as well as all other details of the bonds proposed to be issued for the refunding of said indebtedness, are as follows:

"The said bonds shall be three hundred and sixty (360) in number, and of the denomination of one thousand (1,000) dollars each; and they shall bear interest at the rate of five (5) per cent. per annum, payable annually. They shall be of the character known as 'serials,' and shall be payable, principal and interest, in gold coin of the United States, in the manner following:

"One-fortieth ($\frac{1}{40}$) part of the principal of the indebtedness to be incurred in the issuing of said bonds shall be payable annually, to wit, the sum of nine thousand (9,000) dollars, together with the annual interest on all sums of said indebtedness then unpaid, and said principal and interest shall be payable each and every
67 year on a day to be fixed by the mayor and common council of said city, until the whole amount of said indebtedness is paid. The bonds to be issued shall be numbered consecutively from one (1) to three hundred and sixty (360), both inclusive, and shall be divided into forty (40) series, to be numbered consecutively from one (1) to forty (40), both inclusive, and consisting of nine (9) bonds each. The first series shall include those bonds which are numbered from one (1) to nine (9), both inclusive, and each succeeding series shall include the nine (9) bonds which are numbered consecutively after those included in the next preceding series.

"The bonds included in the first of said series shall be made payable on the fifteenth day of April, A. D. 1895, and all of the remaining series shall be made payable in consecutive order on the fifteenth day of April, in each succeeding calendar year thereafter, until and including the year 1934.

"Said bonds shall be made payable to bearer, and shall bear date sixteenth day of April, 1894, and shall be signed by the mayor and city clerk, and shall have affixed thereto the seal of the city of Santa Cruz. To each of said bonds there shall be attached interest coupons equal in number to the number of years which the bond has to run before its maturity. Each of said coupons shall represent a year's interest upon the principal amount of the bond, at the rate of five (5) per cent. per annum, viz: fifty ($50) dollars, and shall be payable on the fifteenth day of April in each calendar year.
68 Each coupon shall be made payable to bearer, and must bear the lithographed signatures of the mayor and city clerk.

"Said bonds shall be substantially in the following form:

"UNITED STATES OF AMERICA, *State of California.*

"*Bond of the City of Santa Cruz.*

"No. —. Series —. $1,00

"*Refunding Bond.*

"The City of Santa Cruz, a municipal corporation in the coun of Santa Cruz, State of California, is indebted to, and promises pay to the bearer, for value received, the sum of one thousa ($1,000) dollars, gold coin of the United States, on the fifteenth da of April, A. D. ——, with interest thereon in like gold coin, at t rate of five (5) per cent. per annum, payable annually on t 15th day of April of each calendar year from the date hereof, the office of the city treasurer of said city of Santa Cruz, on prese tation and surrender of the proper interest-bearing coupon here attached.

"And for the payment of the principal sum herein named, a the interest accruing thereon, the City of Santa Cruz is held a firmly bound, and its faith and credit and all the real and perso property of said city are hereby pledged for the prompt payme of this bond and interest at maturity.

"This bond is one of a series of bonds of like date, tenor, a effect, issued by the said City of Santa Cruz for the purpo
69 of refunding the bonded indebtedness of said city and iss ing bonds therefor, and providing for the payment of t same, under and in pursuance of, and in conformity with, the pr visions of an act of the legislature of the State of California, entitl 'An act to amend an act entitled "An act authorizing the comm council, board of trustees, or other governing body of any incorp rated city or town, other than cities of the first class, to refund its i debtedness, issue bonds therefor, and provide for the payment the same," (approved March 15, 1883),' approved March 1, 1893.

"And in pursuance of and in conformity with the constitution the State of California, and the ordinances of the city of Santa Cru and in pursuance of and in conformity with a vote of more tha two-thirds of all the qualified electors of said city of Santa Cru voting at a special election duly and legally called and held conducted in said city as provided under said act, on Tuesday, t 13th day of March, 1894, notice thereof having been duly a legally given and published in the manner as required by law, a after the result of said election had been canvassed, found and d clared in the manner and as required by law.

"And it is hereby certified and declared that all acts, condition and things required by law to be done precedent to and in the iss of said bonds, have been properly done, happened, and perform in legal and due form, as required by law. This bond ceases bear interest when due, unless presented for payment.

"In testimony whereof, the said City of Santa Cruz, by its
70 mayor and common council, has caused this bond to be signed by the mayor of said city of Santa Cruz, and attested by its said clerk, with the seal of said city attached, this sixteenth day of April, A. D. 1894.

"—— ——,

"*Mayor of the City of Santa Cruz.*

"[SEAL.]

"(Attest:) —— ——, *City Clerk.*

"The coupons attached to said bonds shall be substantially in the following form:

"Refunding bond number —. Coupon number —.

"The City of Santa Cruz will pay to bearer hereof, on the 15th day of April, A. D. ——, at the office of the city treasurer of said city, fifty ($50) dollars, gold coin of the United States, for interest on bond number —, issued 16th day of April, A. D. 1894.

"—— ——,

"*Mayor of the City of Santa Cruz.*

"—— ——, *City Clerk.*

"Said bonds shall be sold in such manner as may be provided by said common council, to the highest bidder, for not less than their face value, in gold coin of the United States. The proceeds of such sale shall be placed to the credit of the funding fund, and shall be applied only for the purpose of refunding the indebtedness for which said bonds shall have been issued.

71 "In case it shall be determined to refund said bonded indebtedness and issue bonds therefor, a sinking fund shall be created for the payment of the principal of the bonds evidencing said indebtedness of three hundred and sixty thousand ($360,000) dollars and interest thereon as follows:

"The common council shall, at the time of fixing the general tax levy for each year, and in the manner for such tax levy provided, levy and collect annually each year sufficient money to pay one-fortieth ($\frac{1}{40}$) part of the principal of such indebtedness, and also the annual interest on the portion remaining unpaid.

"Said clerk shall prepare for each ward in the city not less than one hundred tickets for every fifty or fraction of fifty electors registered in said ward, to be distributed to the qualified electors of each ward as by law provided.

"The ballots to be used at said election shall be of the same character as those prescribed by law to be used in other elections held in such city of Santa Cruz, and shall have printed thereon the following caption and heading setting forth the proposition to be voted upon, to wit:

"'Municipal ticket;' underneath which shall be printed the respective number of the ward in which said ticket is to be voted; underneath which shall be printed the following: 'Proposition for refunding bonded indebtedness of the city of Santa Cruz to the ag-

gregate amount of three hundred and sixty thousand ($360,000) dollars, and issuing bonds therefor, and providing for the payment of the same;' underneath which shall be printed, 'To vote
72 for or against refunding the indebtedness and issuing bonds therefor, and providing for the payment of the same, stamp a cross (X) in the square to the right of and against the answer you desire to give;' underneath which shall be printed the following: 'For refunding the indebtedness, etc.,' to the right of which shall be printed two (2) squares, the word 'Yes' in one square, with a blank square to the right of it, and the word 'No' in one square, with a blank square to the right of it.

"Qualified electors at said election desiring to assent to or accept the said proposition set forth herein for refunding the indebtedness of the city, issuing bonds therefor, and providing for the payment of the same, shall, in voting, stamp a cross (X) in the square to the right of the word Yes, as printed upon said ballot. Qualified electors at said election desiring to reject said proposition, shall, in voting, stamp a cross (X) in a square to the right of the word No, as printed upon said ballot.

"Said election shall be held and conducted, votes received and canvassed, and returns made and the results determined according to the law governing municipal elections, in said city, in the same manner in which other elections are held in said city of Santa Cruz. The polls of such election shall be opened at sunrise in the morning of said day of election, and shall close at five (5) o'clock p. m. of the same day.

"The voting precincts, places of election, and polling places at which polls will be opened in said city of Santa Cruz for the
73 purpose of voting at said election, and the officers of election designated and appointed to conduct the said election therein, are hereby established and defined and appointed as follows, to wit:

"SECTION 2. The places for holding said election shall be as follows: In the first ward, at the Farmers' Union building, No. 195 Pacific avenue. In the second ward, at the St. Charles Hotel building, No. 13 Mission street. In the third ward, at Young Men's Christian Association building, No. — Pacific avenue. In the fourth ward, at Davis's building, northeast corner of Mission and Bay streets.

"SECTION 3. There are hereby appointed for the first ward: F. B. Curtis and Fred Barson as inspectors; F. P. Cooper and L. S. Harmon, as judges; George A. Chittenden and Harry L. Carter, as clerks; W. S. Fitch and George Birkenseer, as ballot clerks of said election.

"For the second ward: Henry F. Kron and Peter R. Hinds, as inspectors: Edward Gilleran and U. S. Nichols, as judges; Will E. Grant and Edmund Jones, as clerks; J. J. C. Leonard and Vincent Nolan, as ballot clerks of said election.

"For the third ward: N. P. Ingalls and C. E. Huyck, as inspectors; John Morrow and W. M. Rennie, as judges; R. S. Miller and

F. L. Stevens, as clerks; T. J. Egan and Jos. M. Green, as ballot clerks of said election.

"For the fourth ward: Henry Schaw and A. Fridley, as inspectors; A. W. Bryant and W. H. Mason, as judges; E. M. Silvey and J. B. Harris, as clerks; L. L. Fargo and F. H. Parker, as ballot clerks of said election.

74 "The officers of election hereinbefore named and designated, must, prior to entering upon their respective duties, each take the oath of office prescribed by law for such officers of State, county, and municipal elections.

"In case any of the officers of election, so designated and appointed, shall fail to attend, those attending, with the qualified electors assembled, shall fill their *their* places by appointing other competent persons from among the qualified electors present.

"All returns of said special election shall be made out and signed by said officers of the special election in the usual form, and deposited with the city clerk, as provided by law.

"No person shall be entitled to vote at said election unless he be a qualified elector of the city of Santa Cruz.

"If, upon the canvass of the returns of said election, it be found that two-thirds of the votes voting thereat have voted in favor of refunding said indebtedness, issuing bonds therefor, and providing for the payment of the same, then and thereafter said indebtedness shall be refunded, bonds issued therefor, and provision made for the payment of the same, in the manner herein and as by law provided.

"SECTION 4. This ordinance shall take effect from and after its approval.

"I hereby certify that the foregoing ordinance was passed and adopted by the city council of the city of Santa Cruz, at a meeting thereof held this twenty-sixth day of February, A. D. 1894,

75 by the following votes: Ayes—Councilmen F. W. Lucas, J. Ho. Bailey, F. J. Hoffmann, E. G. Green. Noes—None. Absent—None.

"O. J. LINCOLN,

"[SEAL.] *City Clerk of said City of Santa Cruz.*

"Approved this twenty-sixth day of February, A. D. 1894.

"WILLIAM T. JETER, *Mayor.*

"Attest with seal of city.

"[SEAL.] O. J. LINCOLN, *City Clerk.*"

3. The original finding, No. 12, is amended by adding thereto the following: Prior to the purchase of the bonds by E. G. & E. Wallace, Messrs. F. H. Prince & Co. submitted to them a copy of the following opinion of Z. N. Goldsby, city attorney of the defendant, practicing law in the city of Santa Cruz, California, namely:

"SANTA CRUZ, CAL., *April* 25, 1894.

"I hereby certify that I have carefully examined all the steps taken and proceedings had relative to the issuance of $360,000, in five per cent. refunding bonds, by the city of Santa Cruz, in the

State of California, and the bonds issued pursuant thereto, dated April 16, 1894, and find said proceedings regular, and said bonds legally issued and a valid and binding obligation of said city of Santa Cruz.

"Z. N. GOLDSBY."

And, also, submitted a copy of the following opinion of L. B. Gleason, an attorney-at-law practicing in the city of New York, namely:

76 "Messrs. Coffin & Stanton, 72 Broadway, New York city.

"GENTLEMEN: I return you herewith certified copies of the proceedings of the officials of the city of Santa Cruz, Cal., with reference to the issuance of the refunding bonds of said city, bearing date April 16, 1894.

"I have made a careful examination of these papers, and of the constitution and statutes of the State of California, with reference to the issuance of refunding bonds by the cities of said State. All the provisions of the constitution and the statutes of the State seem to have been most carefully and fully complied with, and from my examination, I am of the opinion that these bonds are issued in pursuance of the laws relating thereto, and are legal and valid obligations of the said city of Santa Cruz.

"Yours truly, LAYFAYETTE B. GLEASON."

The copies of the opinion of Goldsby and of Gleason were furnished to F. H. Prince & Co., by Messrs. Coffin & Stanton. These opinions were not satisfactory to E. G. & E. Wallace, and they asked for the opinion of some attorney practicing law in the city of Boston. F. H. Prince & Co. thereupon suggested that the opinion of M. F. Dickinson, Jr., an attorney practicing in that city, should be obtained. This suggestion was satisfactory to E. G. & E. Wallace, and it was then agreed between F. H. Prince & Co. and E. G. & E.
77 Wallace that the opinion of said Dickinson, upon the question of the validity of said bonds, should be obtained by F. H. Prince & Co. F. H. Prince & Co. then, on their own account, and for themselves, and not acting as agents of E. G. & E. Wallace, employed said Dickinson to give his opinion in relation to the validity of such bonds, and as the result of such employment, and as the attorney of F. H. Prince & Co., Dickinson gave to F. H. Prince & Co. the following opinion, which was afterward, by F. H. Prince & Co., submitted to E. G. & E. Wallace, prior to their purchase of such bonds:

"BOSTON, *August* 29, 1894.

"F. H. Prince & Co., 2 and 8 State street, Boston, Mass.

"GENTLEMEN: I have examined the papers that you have submitted in regard to the $360,000 five per cent. refunding bonds of the city of Santa Cruz, Cal., dated April 16, 1894. In my opinion the bonds are legally issued in conformity to the laws of the State of

California, and the ordinances of the city of Santa Cruz, and constitute a legal and valid obligation of said city.

"Very respectfully yours, F. M. DICKINSON, JR."

Said Dickinson had notice of all the matters recited in the ordinances of the defendant city, numbered 314, 315, and 320, but Dickinson did not communicate his knowledge of said ordinances or of any of the facts recited therein, to the said firm of E. G. & E. Wallace; and the said Dickinson in the examination of said or-
78 dinances and in giving said opinion, was not the agent or attorney of E. G. & E. Wallace, but acted solely as attorney of F. H. Prince & Co.

4. That prior to the trial of this cause, and after the issues of fact therein had been made, the parties thereto, both plaintiff and defendant, by their attorneys of record, duly filed with the clerk a stipulation in writing waiving a jury, whereupon this cause was tried and determined by the court without the intervention of a jury.

It is further ordered that the foregoing findings shall have effect as if filed upon the date of September 29, 1898, and the same shall be read in connection with the original findings filed on said date, and shall be deemed a part thereof, and constitute a part of the record upon which the judgment herein is based.

Dated December 1, 1898.

JOHN J. DE HAVEN, *Judge.*

(Endorsed:) Filed December 1, 1898, *nunc pro tunc* as of September 29, 1898. Southard Hoffman, clerk.

79 UNITED STATES OF AMERICA:

In the United States Circuit Court in and for the Ninth Circuit, Northern District of California.

ALBERT H. WAITE, Plaintiff,
vs.
THE CITY OF SANTA CRUZ (a Corporation), Defendant. } No. 12094.

Judgment on Findings.

This cause came on regularly for trial, the parties appearing by their attorneys. A trial by jury having been expressly waived by stipulation signed by counsel for the respective parties, and filed herein, the cause was tried before the court, whereupon witnesses on the part of plaintiff and defendant were introduced, sworn, and testified; the evidence being closed, the cause was submitted to the court for consideration and decision, and after due deliberation thereon, the court filed its findings and decision in writing, and ordered that judgment be entered in accordance therewith.

Wherefore, by virtue of the law and the findings aforesaid, it is considered and adjudged that said Albert H. Waite, plaintiff, have and recover from said The City of Santa Cruz (a municipal corporation), defendant, the sum of twenty-two thousand nine hundred and

fifty dollars ($22,950), with interest thereon from April 15,
80 1895, to this date, together with the said plaintiff's costs and disbursements incurred in this action, amounting to the sum of $685.50.

Entered this twenty-ninth day of September, A. D. 1898.

SOUTHARD HOFFMAN, *Clerk.*

A true copy.

Attest:

[SEAL.] SOUTHARD HOFFMAN, *Clerk.*

(Endorsed:) Filed September 29, 1898. Southard Hoffman, clerk, by W. B. Beaizley, deputy clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

ALBERT H. WAITE
vs.
THE CITY OF SANTA CRUZ. } No. 12094.

Certificate to Judgment-roll.

I, Southard Hoffman, clerk of the circuit court of the United States, for the ninth judicial circuit, northern district of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above entitled action.

81 Attest my hand and seal of the said circuit court, this twenty-ninth day of September, 1898.

SOUTHARD HOFFMAN, *Clerk,*

[SEAL.] By W. B. BEAIZLEY, *Deputy Clerk.*

In the Circuit Court of the United States in and for the Ninth Circuit, Northern District of California.

ALBERT H. WAITE, Plaintiff,
vs.
THE CITY OF SANTA CRUZ (a Corporation), Defendant. } No. 12094.

Opinion.

Chickering, Thomas & Gregory, for plaintiff.
James G. Maguire and Linsay & Cassin, for defendant.
Frank J. Sullivan, *amicus curiæ.*

DE HAVEN, *District Judge:*

This is an action at law to recover the sum of $23,100, claimed to be due on nine refunding bonds, and two hundred and eighty-two interest coupons of $50 each, attached to the same, and other refunding bonds, alleged to have been issued by the defendant
82 on the sixteenth day of April, 1894, payable on April 15, 1895. The action necessarily involves the validity of three hundred and sixty refunding bonds of $1,000 each, purporting to have been issued by the defendant on the sixteenth day of April,

1894. The circumstances under which these bonds were issued may be briefly stated as follows: On Feb. 26, 1894, the defendant, City of Santa Cruz, had an outstanding bonded indebtedness of $271,000, or thereabouts, and was also the owner of certain water works, and necessary appurtenances thereto, including land, water rights, etc., theretofore purchased by it from the City Water Company of Santa Cruz, a private corporation. The water works and appurtenant property were subject to a mortgage which had been placed thereon by the City Water Company of Santa Cruz, for the purpose of securing an outstanding bonded indebtedness of that corporation, in the sum of $89,000, and interest thereon; and on that day the common council of the defendant city, deeming it to be for the best interest of the defendant to refund its bonded indebtedness under the provisions of an act of the legislature of the State of California, entitled "An act to amend an act entitled 'An act to authorize the common council, board of trustees, or other governing body of an incorporated city or town, other than cities of the first class, to refund its indebtedness, issue bonds therefor, and provide for the payment of the same,' approved March 15, 1883," approved March 1, 1893 (Stats. of 1893, page 59); adopted an ordinance, which was duly approved by the mayor, providing for a special election to be held in the city of Santa Cruz, on the thirteenth day of March, 1894, at which there should be submitted to its
83 qualified electors, the question of refunding the outstanding bonded indebtedness of the defendant city. The indebtedness which it was thus proposed to refund, was described in the ordinance as consisting not only of certain bonds of the city of Santa Cruz, amounting to the sum of $271,000, but, also: "Eighty-nine (89) first-mortgage bonds (with interest thereon from November 1, 1893), of the corporation, the City Water Company of Santa Cruz, heretofore issued by said corporation, the City Water Company of Santa Cruz, which bonds bear date May 1, 1890, and are of the denomination of one thousand (1,000) dollars each, and bear interest at the rate of six (6) per cent. per annum, payable semi-annually, and are secured by a mortgage or deed of trust upon the property known as the *as the* city water works of Santa Cruz, executed by the City Water Company of Santa Cruz, as party of the first part therein, to the Holland Trust Company of New York, as trustee, party of the second part therein; and which said bonds outstanding were, at the time of the conveyance by the City Water Company of Santa Cruz to the city of Santa Cruz, of the property known as the city water works, and now are, a valid lien and charge upon said property known as the city water works, and became thereby a part of the bonded indebtedness of the city of Santa Cruz."

More than two-thirds of the qualified electors of the defendant voted at the special election thus called, in favor of the proposition to refund the then outstanding bonded indebtedness of the defendant as described in the ordinance. Thereafter, on March 26, 1894, the common council of the defendant passed, and its mayor
84 approved, an ordinance for the purpose of carrying into effect the will of the electors of the defendant, as expressed at such

special election. This ordinance provided for the issuance of three hundred and sixty interest-bearing bonds of the defendant, of the denomination of $1,000 each, and, also, directed that such bonds should be signed by the mayor and city clerk; and should contain the following recitals:

"This bond is one of a series of bonds of like date, tenor and effect, issued by the said city of Santa Cruz for the purpose of refunding the bonded indebtedness of said city and issuing bonds therefor and providing for the payment of the same, under and — pursuance of, and in conformity with, the provisions of an act of the legislature of the State of California, 'An act to amend an act entitled "An act authorizing the common council, board of trustees or other governing body of any incorporated city or town, other than cities of the first class, to refund its indebtedness, issue bonds therefor and provide for the payment of the same," (approved March 15, 1883),' approved March 1, 1893. And in pursuance of and in conformity with the constitution of the State of California, and the ordinance of the city of Santa Cruz, and in pursuance of and in conformity with a vote or more than two-thirds of all the qualified electors of said city of Santa Cruz, voting at a special election, duly and legally called and held and conducted in said city, as provided under said act, on Tuesday, the thirteenth day of March, 1894, notice thereof having been duly and legally given and published in the manner as required by law, and after the result of said election
85 had been duly canvassed, found and declared in the manner required by law, and it is hereby certified and declared that all acts, conditions and things required by law to be done precedent to and in the issue of said bonds have been properly done, happened and performed in legal and due form and as required by law."

The ordinance further directed that such bonds should, after public notice inviting bids therefor, be sold to the highest bidder, for not less than their face value in United States gold coin, to be paid on delivery of said bonds at the city treasurer's office, in the city of Santa Cruz. The bonds were offered for sale, but there were no bidders for the same, and on April 16, 1894, the date to which the common council of the defendant had regularly adjourned, there were present Wm. T. Jeter, assuming to act as mayor, and J. Howard Bailey, F. J. Hoffmann, E. G. Green and F. W. Lucas, assuming to act as the common council of the defendant. At this meeting a proposition theretofore made by Coffin & Stanton to take all of said bonds was accepted upon condition that satisfactory security for its faithful performance by Coffin & Stanton, should be furnished. This proposition was dated February 27, 1894, and was in substance one by which Coffin & Stanton were to purchase the refunding bonds at par value, less three per cent., without the payment of any money at the time of their delivery, or giving any other consideration therefor, than their promise to take up the outstanding bonds, which were to be refunded, and to forward the same "from time to time to the city for cancellation." On April 23, 1894, the said Wm. T. Jeter, assuming to act as mayor, and the said Bailey, Hoffmann,
86 Green and Lucas, assuming to act as the common council of the defendant, publicly met pursuant to adjournment, and

without protest from any one, accepted and approved a bond presented by Coffin & Stanton, for the faithful performance by them of the agreement contained in the foregoing proposition, and thereupon directed the city clerk of the city of Santa Cruz to deliver to that firm the entire issue of the refunding bonds referred to. The bonds were, in accordance with this direction, delivered to Walter Stanton, of the firm of Coffin & Stanton, on April 24, 1894, and thereafter Coffin & Stanton sold the same to various parties, from some of whom the plaintiff derived title to the bonds and coupons sued on. The plaintiff is only the nominal owner of said bonds, the same having been assigned to him for the purpose of collection only. Coffin & Stanton never complied, in whole or in part, with the agreement under which the bonds were delivered to them, and the city of Santa Cruz never received any benefit whatever from their sale, the entire proceeds thereof having been appropriated by Coffin & Stanton, who are insolvent.

The bonds are under the seal of the defendant, contain the recitals set out, and are signed:

"WM. T. JETER,
"*Mayor of the City of Santa Cruz.*

"Attest: O. J. LINCOLN,
"*City Clerk.*"

Upon the foregoing facts, and others which will be hereafter stated, in discussing the questions to which they particularly relate, the defendant contends:

87 First. That the court has no jurisdiction of the action.

Second. That the act of the legislature, under which the bonds were issued, is in conflict with the constitution of the State of California.

Third. That Wm. T. Jeter was not mayor of the defendant city, neither *de jure* nor *de facto*, at the time when a portion of said bonds were signed by him.

Fourth. That the said Jeter and the other persons above mentioned, who on April 16 and 23, 1894, assumed to act as the mayor and common council of the defendant city, and accepted the proposition of Coffin & Stanton for the purchase of said bonds, and directed their delivery to that firm, were not officers of the defendant, neither *de jure* nor *de facto*, and all of their acts in relation thereto are absolutely void.

Fifth. That said bonds are void because issued in part for the purpose of refunding the private indebtedness of the City Water Company of Santa Cruz; and also because they were delivered to Coffin & Stanton in violation of law and of the ordinances under which they were issued.

Sixth. That the assignors of plaintiff had notice of all the foregoing facts relied upon as a defense to the action, when they purchased the bond and coupons sued on.

In answer to these contentions of the defendant, it is claimed in behalf of the plaintiff:

First. That the persons assuming to act as mayor and common

council of the defendant, on April 16, 1894, and April 23, 1894, were *de facto* officers of the defendant.

88 Second. That the assignors of plaintiff were *bona fide* purchasers of said bonds without notice, and that the defendant is therefore estopped from disputing the truth of the recitals contained in the bonds.

1. The objection that the court has no jurisdiction of the action, was presented by the demurrer to the complaint, and overruled by Judge McKenna, then presiding here. Waite *v.* City of Santa Cruz, 75 Fed., 967. That decision is, however, not necessarily controlling at this time, and as the objection is still insisted upon and has been argued with great earnestness, it is thought proper to again consider it. In support of this objection it is said the defendant did not contract to pay the bonds out of any property or assets subject to execution, but only out of taxes to be levied and collected by its officers, and from this it is argued that the action is substantially a proceeding in the nature of an application for a writ of mandamus to compel the officers of the defendant to perform the duty of levying and collecting the necessary taxes for the payment of such bonds, since without the issuance of such writ, a judgment in favor of plaintiff could not be enforced, and cases are cited to the effect that the circuit courts of the United States have no jurisdiction to entertain an original proceeding in mandamus. Bath County *v.* Amy, 13 Wall., 244; Graham *v.* Norton, 15 Wall., 427; Rosenbaum *v.* Bauer, 28 Fed., 200; S. C., 120 U. S., 455.

That circuit courts of the United States have no jurisdiction to entertain an original proceeding for the issuance of a writ of

89 mandamus to compel the officers of municipal corporations to perform duties imposed upon them by the laws of the State under which they exist, cannot be doubted, and is fully sustained by the above, and by many other cases which could be cited to the same effect. This, however, is not an original proceeding for the issuance of a writ of mandamus. The action is one at law for the purpose of recovering a money judgment, each of the bonds sued on containing a promise upon the part of the defendant "to pay to the bearer, for value received, the sum of one thousand dollars," etc. Of such an action this court has jurisdiction, the plaintiff being a citizen of another State and the amount in controversy exceeding $2,000 (Rev. Stat., sec. 629, as amended by act of Aug. 13, 1888, 25 U. S. Stats., 433). The cases of The County of Greene *v.* Daniel, and The County of Pickens *v.* Daniel, 102 U. S., 187, were not unlike this. These were actions at law to recover upon coupon bonds issued by the counties named, under the provisions of a statute of Alabama, the statute also making it the duty of certain officers to levy and collect a tax to pay the same. The question of the jurisdiction of the court was not raised, but in discussing the sufficiency of the complaint in that action, the court after stating that a mandamus would lie in the courts of the State of Alabama to compel the levying and collection of a tax to pay what was due on the bonds without first reducing the bonds to judgment, said:

"The rule is different, however, in the courts of the United States,

where such a writ can only be granted in aid of an existing jurisdiction. There a judgment at law on the coupons is necessary
90 to support such a writ. The mandamus is in the nature of an execution to carry the judgment into effect. Bath County *v.* Amy, 13 Wall., 244; Graham *v.* Norton, 15 *id.*, 427. Suit, therefore, to get judgment on the bonds or coupons is part of the necessary machinery which the courts of the United States must use in enforcing the claim, and the jurisdiction of those courts is not to be ousted simply because in the courts of the State a remedy may be afforded in another way."

In Heine *v.* The Levee Commissioners, 19 Wall., 655, the court, speaking by Mr. Justice Miller, point out that upon the refusal of a municipal corporation to pay its bonds, the appropriate way to proceed in the Federal courts is to first sue at law and obtain a judgment establishing the validity of the bonds, and then, if necessary, obtain a mandamus to enforce the judgment. This course was followed and upheld in the following, among many, cases which could be cited: Commissioners of Knox Co. *v.* Aspinwall *et al.*, 24 How., 376; Van Hoffman *v.* City of Quincy, 4 Wall., 535; Riggs *v.* Johnson County, 6 Wall., 166; Walkley *v.* City of Muscatine, 6 Wall., 481. A consideration of these cases, as well as section 629 of the U. S. Rev. Stats., above cited, leads to the conclusion that the present action is clearly within the jurisdiction of the court.

2. Cities of the first class (those having a population of more than 100,000) are expressly excepted from the operation of the statute under which the bonds were issued, and because of this exception the defendant insists that the statute is in conflict with subdivision 33 of section 25 of article IV of the constitution of the State
91 of California, which forbids the legislature to pass a local or special law in any case where a general law can be made applicable. A provision like this is to be found in the constitutions of many of the States, and has been the subject of much judicial discussion, and it seems to have been uniformly held by the courts that it is not to be construed as depriving the legislature of the power to enact laws applicable only to a particular class of persons or cities which may reasonably be thought to require rules or regulations different from those of other classes. Abeel *v.* Clark, 84 Cal., 226; McDonald *v.* Coniff, 99 Cal., 386; People *v.* Henshaw, 76 Cal., 436; People *v.* Central Pacific R. R. Co., 105 Cal., 576; State *v.* Pond, 93 Mo., 606; State *v.* Graham, 16 Neb., 74; Johnson *v.* City of Milwaukee, 60 N. W., 270; State *v.* Hawkins, 44 Ohio St., 98; Cooley's Con. Limitations, p. 390.

The constitution of the State of California recognizes the fact that it is wise to classify cities and towns with reference to population, so that legislation relating to their organization may be adapted to the interests or necessities of the different classes. Section 6 of article 11 of that constitution provides:

"Corporations for municipal purposes shall not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization, and classification, in proportion to

population, of cities and towns, which laws may be altered, amended or repealed."

The word "organization" as here used has reference to the powers which may be given to municipal corporations, and it is
92 clear that by this section the legislature is authorized to provide different constitutions or charters for different classes of municipal corporations; that is, the legislature may in its discretion give to one class powers which are withheld from another. Now the statute under consideration here confers upon municipal corporations, other than those of the first class, the power to issue negotiable bonds for the purpose of refunding their outstanding indebtedness. The statute deals with a subject proper to be considered by the legislature in the organization of cities and towns in the first instance, or in subsequent legislation relating thereto. Viewed in this light it is apparent that the statute is not a special or local statute, within the meaning of the constitution prohibiting that character of legislation, and this conclusion is fully sustained by the cases above cited. The question is not whether it was wise to deny to municipal corporations of the first class power which by this statute is conferred upon all others. The statute is not to be declared unconstitutional simply because in the opinion of the court its provisions might well have been extended to all municipal corporations. To do this the court would be substituting its own judgment as to the wisdom and expediency of the statute for the judgment of the legislature, and this it is not authorized to do.

3. Is the action of Wm. T. Jeter in signing the bonds to be regarded as that of its mayor, and were the said Jeter and the persons who assumed to act as members of its common council and caused the bonds to be delivered to Coffin & Stanton, and thus put in circulation, *de facto* officers of the defendant?

These questions may be considered together. They are
93 very important, and have been most elaborately argued by the counsel for the respective parties. The facts out of which they arise are these: On April 11, 1892, Wm. T. Jeter was elected mayor of the defendant city, and J. Howard Bailey, J. F. Hoffmann, E. G. Green and F. W. Lucas were at the same time elected members of its common council, and all qualified and entered upon the duties of their respective offices. The charter of the city of Santa Cruz (Stats. of Cal. 1875–'6, page 189) provides that its mayor and common council shall hold office for a term of two years and until their successors are elected and qualified. On the ninth day of April, 1894, Robert Effey was elected mayor of the defendant city to succeed William T. Jeter; and Henry G. Ensnell, John Howard Bailey, J. D. Maher and Frank K. Roberts were at the same time elected members of the common council. Effey qualified as mayor between the hours of 11 o'clock a. m. and 2 o'clock p. m. of April 16, 1894, and those chosen councilmen qualified before the time fixed for holding the adjourned meeting of the common council of said city on the evening of the same day. In point of fact, the persons so elected mayor and members of the common council, on April 9, 1894, did not, with the exception of Bailey, who

was re-elected councilman, actually enter upon their duties as such officers until May 7, 1894. The said William T. Jeter, Bailey, Hoffmann, Green and Lucas continued to act as mayor and members of the common council of the city of Santa Cruz until May 7, 1894, without protest from any person, and held seven public meet-
94 ings of said council between and including the days of April 16, 1894, and May 7, 1894, and their proceedings were regularly recorded by the city clerk in the proper record books of the city. At one of these meetings, that of April 16, 1894, the proposition of Coffin & Stanton in relation to the purchase and sale of the bonds was accepted upon condition that they should furnish a satisfactory bond for the performance of their agreement, and at the succeeding meeting of April 23, 1894, the bond tendered by them for this purpose was approved, and the city clerk directed to deliver the bonds to them upon the terms of their agreement. This was done, and the bonds thus put in circulation. Many of the bonds so delivered to Coffin & Stanton were signed by William T. Jeter, assuming to act as mayor, on the afternoon of April 16, 1894, after the qualification of his successor, and whether the bonds sued on were among those signed by Jeter before or after the hour when his successor qualified, does not appear. It is claimed by the defendant that as it is not shown that the bonds sued on were signed by Wm. T. Jeter before the qualification of his successor in the office of mayor, the plaintiff has failed to prove that the bonds were signed by an officer authorized to do so, and they must therefore be held void even in the hands of *bona fide* purchasers under the rule declared in Coler *v.* Cleburne, 131 U. S., 162. That case is not authority for the proposition that the action of a *de facto* officer in signing bonds would not be as binding upon the municipality for which he assumes to act as that of an officer *de jure;* and it seems clear to me that if Jeter was the *de facto* mayor when he signed the bonds
95 sued on, then such signature by him was a compliance with the ordinance requiring them to be signed by the mayor; and so, also, if he was *de facto* mayor, and those assuming to act as the common council of the defendant were *de facto* members of the common council at the time when he and they assumed as mayor and common council to accept the proposition of Coffin & Stanton in relation to the bonds, and directed their delivery to that firm, then such acts upon their part are to be treated, so far as concerns the public and third persons having an interest in what was done by them, as the acts of the *de jure* mayor and common council of the city. The rule that the acts of a *de facto* officer are valid as to the public and third persons, is firmly established, although it is sometimes difficult to determine whether the evidence is such as to warrant a finding that a particular act or acts, the legality of which may be in issue in a given case, were those of a *de facto* officer. The contention of the defendant is that Jeter was not the *de facto* mayor at the time of the signing and delivery of *of* the bonds, nor were the old members of the common council, who continued to act as such after the qualification of their successors, and until after the bonds

were delivered to Coffin & Stanton, *de facto* members of the common council of defendant, after the qualification of their successors. Whether one was or was not a *de facto* officer at the time when he assumed to perform duties belonging to a public office, is a mixed question of law and of fact. State *ex rel.* Van Arminge *v.* Taylor, 108 N. C., 196; S. C., 12 L. R. A., 202; U. S. *v.* Alexander,
96 46 Fed., 728. And in passing upon the question presented by defendant's contention upon this point, it is necessary to first consider what facts are sufficient to constitute a *de facto* officer. A *de facto* officer may be defined as one whose title is not good in law, but who is in fact in the unobstructed possession of an office and discharging its duties in full view of the public, in such manner and under such circumstances as not to present the appearance of being an intruder or usurper. When a person is found thus openly in the occupation of a public office, and discharging its duties, third persons having occasion to deal with him in his capacity as such officer are not required to investigate his title, but may safely deal with him upon the assumption that he is a rightful officer. Thus it is said in Petersilea *v.* Stone, 119 Mass., 468:

"Third persons, from the nature of the case, cannot always investigate the right of one assuming to hold an important office, even so far as to see that he has color of title to it by virtue of some appointment or election. If they see him publicly exercising its authority, if they ascertain that this is generally acquiesced in, they are entitled to treat him as such officer, and, if they employ him as such, should not be subjected to the danger of having his acts collaterally called in question."

So, also, in Johns *v.* People, 25 Mich., 503, it is said:

"Persons in the actual and unobstructed exercise of office must be held to be legal officers, except in proceedings where their official character is the issue to be tried as against themselves."

97 To the same effect, also, may be cited the case of Attorney General *v.* Crocker, 138 Mass., 214. That case was one in which the validity of a town meeting election was involved, and the case turned upon the question whether one Crocker, assuming to act as town clerk at such town meeting, was an officer *de facto*. The appointment under which he acted was void, and there was an actual incumbency by him of the office, and acquiescence of the public in his assumption of its duties, only during the one meeting at which the election was conducted. These facts were deemed by the court sufficient to justify the conclusion that Crocker was reputed to be town clerk at that time, and a *de facto* officer in contemplation of law; and in concluding its opinion, the court thus declared the law to be:

"The public and parties having rights depending upon official acts are not so much concerned with the title to an office as they are that the duties of the office shall be performed, and the rights depending upon their performance secured and protected; and when they find an actual incumbent of an office performing its duties, they have a right to rely upon his acts as done by virtue of his office."

In Hamlin *v.* Kassafer, 15 Oregon, 456, it was held that a justice of the peace who continued in the discharge of the duties of such office after the expiration of the legal term for which he had been elected was to be regarded as a *de facto* officer. The court in that case said:

"To constitute a person an officer *de facto*, he must be in the actual possession of the office, and in the exercise of its functions and in the discharge of its duties. When this is the
98 fact necessarily, there can be no other incumbent of the office. An officer *de jure* is one who has the lawful right to the office, but who has either been ousted from, or never actually taken possession of the office."

In State *v.* Williams, 5 Wis., 308, it was held that a governor who continued to hold office illegally after the expiration of his term of office and the qualification of his successor, was a *de facto* governor, and that an act of the legislature approved by him during the time of his illegal incumbency of the office of governor was valid.

The case, however, which is most like this in its facts is that of Magenau & Brunner *v.* City of Fremont, 30 Neb., 843. That case was one involving the validity of an ordinance purporting to have been passed April 9, 1890, and it appeared that E. N. Morse and D. Hein were elected as councilmen of the city of Fremont on April 1, 1890, as the successors to J. J. Lowry and C. A. Peterson, and two days before the passage of the ordinance referred to had qualified as such councilmen, and upon such qualification became *de jure* members of the council. They did not, however, actually enter upon the duties of their office immediately upon qualifying, and Peterson and Lowry, notwithstanding the expiration of their terms of office, were present and acted as members of the council when the ordinance in question was passed. The court thus stated the question before it:

"It is conceded that all who participated at the meeting when the ordinance was adopted were legal members of the council except Peterson and Lowry, whose right to act is questioned on the
99 ground that their successors had previously qualified on April 7. The statute requires that two-thirds of all the members of the council shall be necessary to constitute a quorum for the transaction of business. It is obvious that if Peterson and Lowry could not lawfully act with the council at that meeting, no quorum was present, and the ordinance was invalid."

And after proceeding to show that under the laws of Nebraska the terms of Peterson and Lowry expired upon the qualification of their successors, the court said:

"While Morse and Hein had qualified, they had not, as yet, taken their seats in the council, or participated in the proceedings of that body. The names of Lowry and Peterson appeared upon the roll of members, and they were recognized as such by other members of the council, as well as by the mayor and city clerk. They took part in the proceedings of the council on April 9, without objection from any one, although Morse and Hein were at the time in the council chamber. We conclude, therefore, that Morse and Hein were *de*

jure officers, and that Lowry and Peterson were *de facto* members of the city council. The cases are numerous which hold that the acts of a *de facto* officer, so far as they involve the interests of the public, or third persons, are as valid and binding as though he was an officer *de jure*."

The foregoing cases sufficiently illustrate the principle upon which courts proceed in determining whether one who has assumed to act as a public officer was at the time an officer *de facto*, and it only remains to apply the rule which they establish to the
100 facts which have been already stated as appearing in the present case, and in doing so there is but one conclusion that can be reached, and that is that Jeter was the *de facto* mayor of the city of Santa Cruz, and on the sixteenth day of April, 1894, at the time when he signed the bonds in question, and he and the persons who assumed to act as members of its common council, on the sixteenth and twenty-third of April, 1894, were on those days the *de facto* mayor and the *de facto* members of the common council of the defendant city.

4. The issuance of bonds for the purpose of refunding the indebtedness of the City Water Company of Santa Cruz, a private corporation, was not authorized by the act under which the bonds in controversy purport to have been issued, and as the bonds issued by the defendant for that purpose were not segregated from others of the same issue, the court is not able to determine which particular bonds were to be devoted to the purpose of refunding the indebtedness of the private corporation, and the plaintiff is not entitled to recover in this action (Ætna Life Ins. Co. *v.* Lion Co., 44 Fed., 329, and Hedges *v.* Dixon Co., 150 U. S., 182), unless his contention that he is a *bona fide* purchaser without notice of this infirmity in the bonds, and as such is protected by the recitals contained therein, can be sustained.

First, as to the fact: Is the plaintiff a *bona fide* purchaser without notice? The plaintiff is only the nominal holder of the bonds and coupons sued on, they having been assigned to him for purposes of collection only. It therefore becomes necessary to determine whether his assignors, who are the real owners of such bonds and coupons, were purchasers without notice.

101 It is conceded that the Northern Counties Investment Trust Company, Limited, the owner of three of the coupons sued on, was not a *bona fide* purchaser. There are other assignors of plaintiff whose rights are disputed by defendant, but it is only deemed necessary to consider in this opinion whether Wallace & Co., who own eight of the nine bonds sued on, were *bona fide* purchasers without notice. It is not claimed that they had actual notice of any of the matters which defendant now urges against the validity of the bonds. The evidence shows that on or about September 22, 1894, this firm purchased from Coffin & Stanton one hundred and fifty of the refunding bonds referred to in the complaint in this action, giving in exchange therefor four hundred and thirty-five shares of the capital stock of the Page Belting Company and $116,400 in money. In making this exchange Wallace & Co.

were represented by F. H. Prince & Co., who were also at the same time acting for Coffin & Stanton, in the sale of the bonds. Prince & Co. received $2,500 from Wallace & Co. for services as their agents in the matter, and were also to receive from Coffin & Stanton, for services rendered them in the same transaction, a division of all profits which should be realized by Coffin & Stanton upon the resale of the stock of the Page Belting Company. Prior to effecting the exchange of these bonds for the sum of money above stated and the stock of the Page Belting Company, the ordinances under which the bonds were issued were placed in the hands of Prince & Co., for examination, but there is an entire absence of evidence upon the point whether the ordinances were in fact read by them, and
102 whatever the fact may be in relation to this, I do not think the plaintiff's right to recover is affected thereby. If it should be conceded that Prince & Co. had notice that the bonded indebtedness of the private corporation was described in the ordinances as a part of the bonded indebtedness of the defendant to be refunded by the issuance of the bonds in controversy, their knowledge was not communicated to Wallace & Co. The question then arises whether such knowledge, if possessed by Prince & Co., should be imputed to Wallace & Co. In my opinion, it should not.

To the general rule that notice to an agent while he is engaged in transacting business for his principal, of matters relating to such business, is notice to the principal, there is an exception which is as well settled as the rule itself. The exception is, that when in the transaction of business entrusted to him by his principal, the agent really acts for his own benefit or for the benefit and advantage of the other party to the transaction, notice to him is not deemed constructive notice to his principal. Benedict *v.* Arnoux, 154 N. Y., 715; Dillaway *v.* Butler, 135 Mass., 479; De Kay *v.* Hackensack Water Co., 38 N. J. Eq., 158. The facts of this case bring it clearly within the exception stated and applied in the cases just cited.

When an agent assumes to act upon account of his principal, and at the same time is to share in the profits which the other party to the contract may gain in the business transacted, the agent cannot be said to be acting in that matter in good faith towards his
103 principal, but he is really acting for himself as well as for the benefit and advantage of the other party with whom he is to share the profits. This was the position occupied by Prince & Co., in the transaction by which Wallace & Co. became purchasers of the bonds in suit, and such being the case, any knowledge possessed by them, showing that some of the bonds purchased were issued for a purpose not authorized by law, is not to be imputed to Wallace & Co.

It is further claimed by the defendant that Mr. M. F. Dickinson, one of the attorneys who passed upon the validity of the bonds, was also the agent of Wallace & Co. in that matter; that his opinion, given to Prince & Co., shows that he had the ordinances under which the bonds were issued before him; and that the knowledge which he obtained therefrom must be imputed to Wallace & Co. In passing upon this contention of defendant, it will be sufficient to

say that the evidence points to the fact that Mr. Dickinson was employed by Prince & Co. in the matter referred to, upon their own account, and not as the attorney of Wallace & Co. I do not overlook the fact which is strongly urged by defendant, that during the negotiations Wallace & Co. expressed themselves as not willing to rely upon the opinions of certain attorneys submitted to them by Prince & Co., concerning the validity of the bonds, and asked them for the opinion of Mr. Dickinson, but this circumstance is not inconsistent with the conclusion, which I think is sustained by a consideration of the entire evidence, that the opinion thereafter obtained from him was procured by Prince & Co. upon their
104 own account. The testimony of Sumner Wallace, of the firm of Wallace & Co., is that all of the legal opinions submitted to his firm, including that of Mr. Dickinson, were procured by Prince & Co., or by Coffin & Stanton. The only other witness giving evidence bearing upon the question is F. H. Prince, and he testified that Mr. Dickinson was employed by Prince & Co.; and there is nothing in his deposition from which the inference can be drawn that in the matter of employing Mr. Dickinson that firm was acting or supposed they were acting as agents of Wallace & Co., or that Dickinson was to be paid by the latter firm. Prince & Co. were directly interested in effecting the exchange of the Page Belting Company's stock for the bonds, by reason of the commission they were to receive from Wallace & Co., on the one side, and the profits they were to share with Coffin & Stanton on the other; and in view of this interest, it is not difficult to believe that after learning from Wallace & Co. that an opinion from Mr. Dickinson would be satisfactory to them, Prince & Co. may have obtained the opinion of that gentleman on their own account, so as to insure the success of the negotiations in which they were engaged. At any rate, the direct evidence of F. H. Prince is that Dickinson was employed by Prince & Co., and for the reasons stated I am disposed to regard this statement as true.

It is next insisted by defendant that Wallace & Co. must be deemed to have purchased such bonds with notice that they were issued in part to refund and take up the mortgage bonds of the private corporation, because each bond contained the recital
105 that it was issued "in pursuance to and in conformity with the constitution of the State of California, and the ordinances of the city of Santa Cruz."

The proposition for which the defendant contends upon this point is, that by this general reference to the ordinances of the city, all purchasers were put upon inquiry as to the terms of the ordinances under which the bonds were issued; and that as it appears from these ordinances that a part of the refunding issue was to be used in refunding the mortgage bonds of the private corporation, all persons purchasing the bonds are to be charged with notice of this fact. I do not think this contention can be sustained, although it is apparently supported by the case of Post *v.* Pulaski county, 49 Fed., 629, cited by the counsel for defendant. The recital above quoted does not stand alone. In addition to and immediately preceding

it, the bonds under consideration expressly state that they were "issued for the purpose of refunding the bonded indebtedness" of the city of Santa Cruz, and in conformity with the act of the legislature which they recite. The further statement that their issuance was also in conformity with the ordinances of the city of Santa Cruz, does not detract from or modify the effect of the prior recital concerning the purpose for which the bonds were issued, and certainly cannot be construed as a warning to purchasers to examine the ordinances and determine for themselves and at their peril whether the previous representation in relation to the purpose for which the bonds were issued was true or false. On the contrary, this general reference to the ordinances of the city of Santa Cruz must be
106 read in connection with the other parts of the instrument in which it is found, and when this is done and all the recitals are given effect, it is at once seen that they import not only that the bonds were issued in conformity with the act of the legislature, "but that the ordinances of the city council were in conformity with the statute."

Evansville *v.* Dennett, 161 U. S., 434; see also Hackett *v.* Ottawa, 99 U. S., 86, and the well-considered case of Risley *v.* Village of Howell, 64 Fed., 453.

5. In view of what has been said, the conclusion necessarily follows that Wallace & Co. were *bona fide* purchasers of the bonds and coupons assigned to plaintiff, and without notice of any infirmity attaching thereto. What effect, then, is to be given the recitals contained in the bonds? Is defendant estopped from disputing the truth of such recitals? The argument of counsel for defendant on this point is, that there was a total want of power in the mayor and common council of the defendant to refund the private indebtedness of the City Water Company of Santa Cruz; that in issuing bonds for that purpose these officers exceeded the authority conferred upon them by the statute, and their act in that respect was not merely an irregularity, but absolutely void, and that the defendant is not estopped by recitals contained in bonds thus issued without authority from showing that such recitals are false, and that the bonds were issued in part to refund the indebtedness of the private corporation and are therefore void. This argument has received, as it deserved, most careful consideration, and some
107 of the cases cited by counsel in its support will be referred to. In one of these, that of Hopper *v.* Covington, 118 U. S., 148, it was said:

"When the law confers no authority to issue the bonds in question, the mere fact of their issue cannot bind the town to pay them, even to a purchaser before maturity and for value." The court in the case just cited was not dealing with the question as to how far a *bona fide* purchaser of municipal bonds is protected by recitals contained therein, the bonds before it containing none. The entire scope of the decision in that case is, that it is incumbent upon a plaintiff suing upon bonds which contain no recitals, to state in his complaint the facts showing that the municipality was authorized

to issue the bonds. This appears very clearly from the opinion in which the court, in addition to the extract above quoted, said:

"The bonds in suit containing no statement of the purpose for which they were issued, and no recital which can bind the town by way of estoppel, any one suing upon the bond is bound to allege and prove the authority of the town to issue them." In Hayes *v.* Holly Springs, 114 U. S., 120, the validity of the bonds depended upon the fact that the town had been authorized to issue the same at a special election held for that purpose. The bonds upon their face recited that such election had been had, but in point of fact, at the time of the election there was no statute in existence which authorized it. Of course in such a case the purchaser of the bonds would be charged with notice of the non-existence of a statute authorizing the election, the authority of the city to issue its
108 bonds depending upon the existence of such a statute; and it was in respect to that state of facts that the court said:

"Even a *bona fide* holder of a municipal bond is bound to show legislative authority in the issuing body to create the bond. Recitals *in pais*, operating by way of estoppel, may cure irregularities in the execution of a statutory power, but they cannot create it. If, as in the present case, legislative authority was wanting, the bond has no validity." In Merrill *v.* Monticello, 138 U. S., 673, nothing more was decided than that the implied power of the town of Monticello to borrow money for corporate purposes did not carry with it the further power to issue negotiable bonds for the amount so borrowed. In Daviess County *v.* Dickinson, 117 U. S., 657, it was held that bonds issued by a county in excess of the amount authorized by law were void, and that the county was not estopped from making such defense as to the overissue by the unauthorized certificate of the county judge that the bonds were issued pursuant to the statute. The point of the decision in relation to the non-effect of the certificate referred to is contained in the following language:

"The certificate is not a recital in the bond. It is not the act of the county court, is not under its seal, nor signed by its clerk; but is simply the certificate of the person holding the office of judge of that court. Neither the statute, nor the vote of the people, nor the order of the county court, empowered him to make such a certificate, or to determine the question whether the county court had exceeded the power conferred upon it." Manifestly, that case is not authority upon the point now under discussion.

109 In Township of East Oakland *v.* Skinner, 94 U. S., 255, the question as to how far a municipality is estopped by recitals of matters of fact contained in negotiable bonds issued by it was not involved, and was neither decided nor discussed. The bonds upon which a recovery was sought in that case were issued to pay a subscription of the town of East Oakland in the State of Illinois to the capital stock of a railroad corporation. The constitution of Illinois prohibited the town from making such subscription, unless authorized by a vote of the people, and there was no statute providing for such an election. The bonds showed upon their face the purpose for which they were issued, and consequently carried notice to pur-

chasers that they were issued to pay a subscription prohibited by the constitution, because not authorized by any statute. It was in view of these facts that the court, in its opinion, used the general language relied upon by the defendant here, to the effect that there was a total want of authority in the town to issue them, and there could be no *bona fide* holding of such bonds. The case is the same in principle as that of Hayes *v.* Holly Springs, 114 U. S., 120, already mentioned.

The case at bar is in its facts entirely different from those to which reference has been made, and by reason of this there is a broad and clear principle of law to be applied to its decision, which was not involved in either of the cases above referred to. The statute under which the bonds in suit purport to have been issued authorized the defendant, upon conditions named therein, to issue bonds for
110 the purpose of refunding that part of its indebtedness evidenced by bonds and warrants. The authority thus given must be construed as one to issue negotiable bonds in the usual form (City of Cadillac *v.* Woonsocket Inst. for Savings, 58 Fed., 935; Ashley *v.* Board of Supervisors, 60 Fed., 55), with recitals showing their binding obligation; and there can be no doubt that if the recitals in these bonds are true, they are valid obligations of the defendant. In view, then, of the fact that there was legislative authority for the issuance by the defendant of bonds of the character of those sued on, what effect is to be given by the recital, that every act required by the statute as a condition precedent to their issuance was *pered;* and the further recital, that the bonds were issued for the precise and definite purpose prescribed by law, to wit, to refund the bonded indebtedness of the defendant? Can the defendant as against an innocent purchaser be permitted to defeat a recovery upon such bonds by showing the falsity of the recitals appearing upon their face? Upon the point presented by these questions there is great unanimity in the decisions of the Federal courts in holding that the effect of recitals like those contained in the bonds under consideration is to estop the municipality from averring against their truth, and the case falls clearly within the principle declared in Orleans *v.* Platt, 99 U. S., 682, in the following language:

"Where the bonds on their face recite the circumstances which bring them within the power, the corporation is estopped to deny the truth of the recital."

111 The decision in Hackett *v.* Ottawa, 99 U. S., 86, announces the same rule. In that case the defendant insisted that there was a total want of authority to issue the bonds upon which that action was based, because they were not issued for a municipal purpose, just as here the defendant contends that some of these bonds were not issued for the authorized municipal purpose of refunding its indebtedness, but to refund the private indebtedness of the City Water Company of Santa Cruz. The court, however, in that case held that inasmuch as the bonds recited that they were issued for a municipal purpose, the city was estopped from showing that such recital was untrue. The court said:

"The city is therefore estopped by its own representations to say, as against a *bona fide* holder of the bonds, that they were not issued or used for municipal or corporate purposes. It cannot now be heard, as against him, to dispute their validity. * * * It would be the grossest injustice, and in conflict with all past utterances of this court, to permit the city, having power under some circumstances to issue negotiable securities, to escape liability upon the ground of the falsity of its own representations, made through official agents and under its corporate seal, as to the purposes with which these bonds were issued."

The authority of these cases has never been questioned in any of the later decisions of the Supreme Court, and the principle upon which they were decided was reaffirmed in the case of Chaffee County *v.* Potter, 142 U. S., 355. The recital found in each
112 of the bonds sued on that it was issued for the purpose of refunding the bonded indebtedness of the city of Santa Cruz, is the statement of a fact and not the recital of a conclusion of law. When a municipality is authorized, as was the defendant here, to issue bonds containing recitals of matters of fact, showing that they were issued in accordance with law and for a purpose authorized by the law, the duty of ascertaining the truth of the facts recited must necessarily rest upon its officers; and that in such a case the municipality is estopped as against a *bona fide* holder from disputing the truth of the recitals contained in the bonds issued by it, is fully sustained by Commissioners of Knox County *v.* Aspinwall *et al.*, 21 How., 539; Chilton *v.* Town of Gratton, 82 Fed., 873; Sherman County *v.* Simons, 109 U. S., 735; Town of Coloma *v.* Eaves, 92 U. S., 484; Bernard's Township *v.* Morrison, 135 U. S., 523; Provident Trust Co. *v.* Mercer County, 170 U. S., 593; West Plains *v.* Sage, 69 Fed., 953; Risley *v.* Village of Howell, 64 Fed., 453; City of Huron *v.* Second Ward Savings Bank, 86 Fed., 272. The rule declared in these cases is founded upon principles of common honesty, which municipal corporations, as well as individuals and private corporations, must observe at their peril, because, as was said by the court in Bissell *et al. v.* City of Jeffersonville, 24 How., 287:

"A corporation quite as much as an individual, is held to a careful adherence to truth in their dealings with other parties, and cannot by their representations or silence involve others in onerous engagements, and then defeat the calculations and claims their
own conduct has superinduced." There are many other
113 objections urged by the defendant against the validity of the bonds which need not be noticed at length, as what has been said is decisive of the questions which they present. Thus, the objection that, assuming that all the bonds were issued for a municipal purpose, the issue was in excess of the amount authorized by the statute, even if true, cannot under the authority of Chaffee County *v.* Potter, 142 U. S., 355, be availed of as a defense in the face of the express recitals of the bonds, no one bond showing upon its face the total amount of bonds issued. So, also, in relation to the objection that the polls were not kept open during the entire time prescribed

by the statute when the question of issuing the bonds was voted upon by the people, it may be answered that this was a mere irregularity, of which it may be doubted whether the defendant could under any circumstance take advantage, in a collateral action like this, but clearly is estopped by the express recitals contained in the bonds from urging such a defense at this time. The same principle is applicable to the contention that the officers of the city violated the statute in delivering the bonds to Coffin & Stanton without the payment of any money and upon their simple promise to redeem certain outstanding bonds of the defendant and the City Water Company of Santa Cruz. Certainly the delivery of the bonds under such an agreement was a gross violation of the statute, but this is a matter which cannot be permitted to affect such of the assignors of the defendant as were *bona fide* purchasers without notice, as they had a right to rely upon the express recitals contained in the
114 bonds, to the effect that they were issued pursuant to the statute. In conclusion upon this point, it may be laid down as a general rule that when municipal bonds recite facts which, if true, show they were issued upon the conditions and for a purpose authorized by law, the *bona fide* purchaser, without notice of any infirmity therein, may safely rely upon such recitals. He owes no duty to the municipality, and is not required for his own protection to make an investigation for the purpose of ascertaining whether the recitals are true or false, unless the constitution of statute under which the bonds purport to have been issued expressly or by implication provide that he must look beyond the face of the bonds for the purpose of ascertaining the existence of the facts justifying their issuance. The cases of Dixon County *v.* Field, 111 U. S., 83; Lake County *v.* Graham, 150 U. S., 674, as explained in the later case of Chaffee County *v.* Potter, 143 U. S., 355, are not opposed to this conclusion; and the same also may be said of Sutliff *v.* Lake County Commissioners, 147 U. S., 230. The rule stated is founded not only upon principles of equity, but is also consistent with public policy, which seeks to give stability and value to this class of negotiable instruments, by inviting the confidence of *bona fide* purchasers for value. The law which determines what the judgment must be in this case is clear, and, in conclusion, what was said in Barnard's Township *v.* Morrison, 133 U. S., 523, may well be repeated here:

"Whatever may be the hardship of this particular case, to sustain the defenses pressed would go far towards destroying the market value of municipal securities."

115 Judgment must be entered in favor of the plaintiff for the amount demanded, less the sum of the three coupons as signed to plaintiff by the Northern Counties Investment Trust Company, Limited.

(Endorsed:) Filed September 29, 1898. Southard Hoffman, clerk, by W. B. Beaizley, deputy clerk.

In the Circuit Court of the United States in and for the Ninth Circuit, Northern District of California.

Hon. J. J. De Haven, judge.

ALBERT H. WAITE, Plaintiff,
vs.
THE CITY OF SANTA CRUZ (a Corporation), Defendant. } No. 12094.

Bill of Exceptions.

Be it remembered, that the above-entitled action, coming on regularly for trial upon the second day of November, 1897, in the above-entitled court, before the court sitting without a jury, a jury trial having been by the parties duly waived by a stipulation in writing, in the words and figures following: "A jury trial in the above-entitled action is hereby waived," signed by the attorneys for the respective parties and duly filed with the clerk prior to the
116 commencement of the trial, William Thomas, Esq., and M. C. Sloss, Esq., appearing as attorneys for plaintiff, and James G. Maguire, Esq., and Carl A. Lindsay, Esq., appearing as attorneys for the defendant, the following proceedings were had, evidence received, rulings made and exceptions taken:

Mr. Thomas made an opening statement on behalf of plaintiff, and thereupon offered and read in evidence the following stipulation of counsel as to certain facts:

(Title of Court and Cause.)

Stipulation as to Certain Facts.

It is hereby stipulated and agreed by and between the parties to the above-entitled action that certain facts may be and are hereby taken, for the purposes of this action, to be true, and shall be regarded as proven, subject to all objections as to their materiality, without the introduction of any evidence thereon by either party. The facts so agreed to be proven and taken to be true are the following:

That the signatures of all the bonds and coupons sued on in this action are genuine.

That all of the bonds and coupons sued on in this action were, prior to the filing of the original complaint herein, duly assigned to the plaintiff, and that the legal title to all said bonds and coupons is in the plaintiff and was in the plaintiff at the time of the commencement of this action.

That the plaintiff did not pay any money consideration for
117 the assignment to him of any of said bonds or coupons, but all of said bonds and coupons were assigned to plaintiff for collection only.

That within ten days after the thirteenth day of April, 1892, William T. Jeter duly qualified as mayor and J. Howard Bailey, F. J. Hoffmann, E. C. Greene and F. W. Lucas duly qualified as councilmen, and O. J. Lincoln *only* qualified as city clerk of the defendant.

That in the minute book of the proceedings of the mayor and common council of the defendant, The City of Santa Cruz, appear the following entries, entered under the dates hereinafter particularly specified:

Second session of regular April meeting of the common council, April 13, 1892.

The common council met pursuant to adjournment.

Roll-call—present: His honor, G. Bowman, mayor; councilmen, Finkeldey, Young, Drullard, and the clerk.

It was upon motion voted that the council now proceed to canvass the returns of the charter election held April 11, A. D. 1892, which have been filed with the clerk; the seals of the several packages were examined by the council and found intact.

(At such canvass William T. Jeter received a plurality and was declared duly elected mayor of the city of Santa Cruz, and J. Howard Bailey, F. J. Hoffman, E. G. Greene and F. W. Lucas were duly elected councilmen, and G. J. Lincoln, city clerk.)

Approved.

G. BOWMAN, *Mayor.*

Attest: C. J. LINCOLN, *City Clerk.*

118 CITY OF SANTA CRUZ, *May* 2, 1892.

The mayor and common council elect having qualified as required by law, were conducted to their seats by the retiring board.

Roll-call—present: His honor, W. T. Jeter, mayor; councilmen, F. W. Lucas, J. H. Bailey, F. J. Hoffmann, E. G. Greene and the clerk.

Approved.

WM. T. JETER, *Mayor.*

Attest: C. L. LINCOLN, *City Clerk.*

Meeting of February 5, 1894. All present.

The proposition to refund the bonded indebtedness of the city of Santa Cruz and issue bonds therefor and provide for the payment of the same, under and according to the provisions of an act of the legislature approved March 1, 1893, was brought up for consideration and referred to the ordinance committee with a recommendation of the mayor to report thereon at the earliest practicable date.

Approved March 5, 1894.

WM. T. JETER, *Mayor.*

Attest: C. L. LINCOLN, *City Clerk.*

Meeting of February 19, 1894. All present.

Ordinance No. 314. An ordinance calling for a special
119 election and submitting to the qualified voters of the city of Santa Cruz the question of refunding the bonded indebtedness of said city, issuing bonds therefor and providing for the payment of the same, was read by the clerk and was referred by his honor the mayor to the ordinance committee.

Ordinance No. 315. An ordinance providing for notice to be

given of a special election in the city of Santa Cruz, to be held March 13, 1894, for the purpose of submitting to the qualified electors of said city the question of refunding the bonded indebtedness of said city, issuing bonds therefor and providing for the payment of the same, was read by the clerk and referred by his honor the mayor to the ordinance committee.

Approved March 5, 1894.

WM. T. JETER, *Mayor.*

Attest: C. J. LINCOLN, *City Clerk.*

Meeting of February 26, 1894. All present.

Ordinance No. 314, calling a special election and submitting to the qualified electors of the city of Santa Cruz the question of refunding the bonded indebtedness of said city, issuing bonds therefor and providing for the payment of the same, was reported favorably upon by the ordinance committee and read for the second time by the clerk; thereupon it was moved by Councilman Hoffmann, and seconded by Councilman Greene, that said ordinance be passed.

His honor, the mayor, put the motion to a vote, Councilmen
120 Lucas, Bailey, Hoffman and Greene voting "Aye;" thereupon his honor declared the motion carried and ordinance No. 314 duly passed.

Ordinance No. 315, providing for notice to be given of a special election in the city of Santa Cruz, to be held March 13, 1894, for the purpose of submitting to the qualified electors of said city the question of refunding the bonded indebtedness of said city, issuing bonds therefor, and providing for the payment of the same, was reported favorably upon by the ordinance committee and read for the second time by the clerk; thereupon it was moved by Councilman Bailey, and seconded by Councilman Lucas, that said ordinance be passed. His honor, the mayor, put said motion to a vote, Councilmen Lucas, Bailey, Hoffman and Greene voting "Aye;" thereupon his honor declared the motion carried, said ordinance No. 315 duly passed.

Approved March 5, 1894.

WM. T. JETER, *Mayor.*

Attest: O. J. LINCOLN, *City Clerk.*

Meeting of March 12, 1894. All present.

The ordinance committee presented the following resolution:

Resolved, That the great register of the county of Santa Cruz used at the last general election therein, be adopted as the register of the electors of and residing in the city of Santa Cruz, and to be used as such at the special election to be held in said city of
121 Santa Cruz on the thirteenth day of March, 1894, was read, and upon motion, etc, was adopted.

Approved April 2, 1894.

WM. T. JETER, *Mayor.*

Attest: O. J. LINCOLN, *City Clerk.*

Canvassing of Election Returns.

Meeting of March 15, 1894. All present.

The returns of the special election held on Tuesday, March 13, 1894, submitting to the qualified voters of the city of Santa Cruz the proposition of refunding the bonded indebtedness of said city, issuing bonds therefor, and providing for the payment of the same, having been legally and regularly made and filed by the city clerk, the said returns were now duly opened and canvassed by the mayor and common council, and the result was found to be as follows, viz:

Whole number of votes cast..... 595

	Yes.	No.
In the first ward:		
For refunding the indebtedness, etc.....	140	20
In the second ward:		
For refunding the indebtedness, etc..... ..	144	9
In the third ward:		
For refunding the indebtedness, etc	207	19
In the fourth ward:		
For refunding the indebtedness, etc.....	47	9
	538	57

122 It appearing to the mayor and council from the canvass of said returns that more than two-thirds of all the votes cast in said special election *was* for the proposition, to wit, that there *was* cast in favor of said proposition five hundred and thirty-eight votes and fifty-seven votes were cast against said proposition; *whereupon* his honor, the mayor, declared that the proposition for refunding bonded indebtedness of the city of Santa Cruz to the aggregate amount of $360,000, and issuing bonds therefor and providing for the payment of the same, was carried by more than two-thirds of the qualified electors of the city of Santa Cruz voting at said election.

Ordinance No. 317, declaring the result of the special election, was read, and upon motion of Councilman Hoffman, seconded by Councilman Greene, it was voted to suspend the rules for the purpose of putting said ordinance upon its passage. It was now moved by Councilman Hoffman, and seconded by Councilman Greene, that ordinance No. 317 be passed. The motion was put to a vote by his honor, the mayor, Councilmen Lucas, Bailey, Hoffman and Greene voting "aye;" noes none. Thereupon the mayor declared the motion carried and ordinance No. 317 duly passed.

Approved April 2, 1894.

WM. T. JETER, *Mayor.*

Attest: O. J. LINCOLN, *City Clerk.*

123 *Canvassing of Election Returns.*

Meeting of March 19, 1894. All present.

The returns of the special election held on Tuesday, March 13, 1894, submitting to the qualified voters of the city of Santa Cruz the proposition of refunding the bonded indebtedness of said city, issuing bonds therefor and providing for the payment of the same, having been legally and regularly made and filed with the city clerk, the said returns were now duly opened and canvassed by the mayor and common council, and the result was found to be as follows, viz:

Whole number of votes cast..... 595

	Yes.	No.
In the first ward:		
For refunding the indebtedness, etc.....	140	20
In the second ward:		
For refunding the indebtedness, etc.....	144	9
In the third ward:		
For refunding the indebtedness, etc.....	207	19
In the fourth ward:		
For refunding the indebtedness, etc.....	47	9
	538	57

It appearing to the mayor and council from the canvass of said returns that more than two-thirds of all the votes cast at said special election *was* for the proposition, to wit, that there *was* cast in favor of said proposition five hundred and thirty-eight votes, and *thirty*-seven votes were cast against said proposition; thereupon his honor,

124 the mayor, declared that the proposition for refunding bonded indebtedness of the city of Santa Cruz to the aggregate amount of $360,000, and issuing bonds therefor and providing for the payment of the same, was carried by more than two-thirds of the qualified electors of the city of Santa Cruz voting at said election.

Ordinance No. 318, declaring the result of the special election, was read, and upon motion of Councilman Hoffman, seconded by Councilman Greene, it was voted to suspend the rules for the purpose of putting said ordinance upon its passage. It was now moved by Councilman Greene and seconded by Councilman Bailey that ordinance No. 318 be passed. The motion was put to vote by his honor, the mayor, Councilmen Lucas, Bailey, Hoffman and Greene voting "aye;" noes, none. Thereupon the mayor declared the motion carried and ordinance No. 318 passed.

Approved April 2, 1894.

WM. T. JETER, *Mayor.*

Attest: O. J. LINCOLN, *City Clerk.*

Meeting of March 26, 1894. All present.

Ordinance No. 320, providing for refunding the bonded indebtedness of the city of Santa Cruz, issuing bonds therefor, and providing for the payment of the same, and for the sale and manner of sale of the bonds so issued, and directing the clerk to give notice inviting sealed proposals for the sale of bonds so issued, and also providing for the disposition of the funds derived from the sale of the bonds so issued, was read, and upon motion, duly made
125 and seconded, it was voted to suspend the rules for the purpose of putting ordinance No. 320 upon its passage. It was now ordered by Councilman Hoffman, and seconded by Councilman Greene, that said ordinance be passed. His honor put said motion to a vote, Councilman Lucas, Bailey, Hoffman, Greene voting "aye;" noes, none. Thereupon his honor declared the motion carried and ordinance No. 320 duly passed and adopted.

Approved April 2, 1894.

WM. T. JETER, *Mayor.*

Attest: O. J. LINCOLN, *City Clerk.*

Meeting of April 16, 1894. All present.

This being the time fixed for opening the proposals for the purchase of $360,000 of refunding bonds, and no bids having been filed, it was moved by Councilman Bailey and seconded by Councilman Greene that the proposition of Coffin and Stanton, dated February 27, 1894, to refund the city's indebtedness, be accepted upon satisfactory security and indemnity being given for the faithful performance of the same; said motion was carried by the following vote: "Aye," Councilmen Lucas, Bailey, Hoffman, and Greene; noes, none; and was so declared by his honor the mayor.

Approved May 5, 1894.

WM. T. JETER, *Mayor.*

Attest: —— ——, *City Clerk.*

126 Meeting of April 23, 1894. All present.

Walter Stanton now presented a bond of Coffin & Stanton, with the American Debenture Company of Chicago as surety, in sum of $360,000 for the faithful performance of a certain contract with the city dated February 27, 1894, which was read and submitted to the city attorney, said bond being approved by the attorney as to form, and it appearing to the board from the report of "Dunn's commercial agency" that the rating of said sureties was the highest given, and satisfactory to the council, it was moved by Councilman Bailey and seconded by Greene that said bond be accepted and approved; motion was carried by the following vote: "Aye," Councilman Lucas, Bailey, Hoffman, and Greene; noes, none.

The clerk was ordered to deliver said bonds to Coffin & Stanton.

Upon motion it was ordered that the contract of Coffin & Stanton to refund the city's indebtedness dated February 27, 1894, and accepted by the council April 16, 1894, be entered upon the minutes of the board, viz:

The city of Santa Cruz deciding to refund $225,000 in 5 per cent.

bonds, $89,000 in 6 per cent. mortgage bonds, $39,000 municipal improvement bonds, with accrued interest thereon, total $360,000, in 5 per cent. refunding bonds of the denomination of $1,000 each, legally issued under the act of the legislature of the State of California, approved March 1, 1893, advertising the sale of same and in the event of the city not securing satisfactory bids for such bonds at said sale, Coffin and Stanton agree to purchase said bonds
127 at par and accrued interest, contracting with the city to assume all obligations of interest and principal on the bonds to be refunded, making the refunding an assured fact from the date of the sale and delivery of the bonds to them.

The funds derived from the purchase of the $360,000 in said bonds to be deposited with Coffin & Stanton to the credit of the funding fund and to be used to take up and refund the outstanding bonds as above mentioned; Coffin & Stanton forwarded same from time to time to the city for cancellation, charging such bonds to the funding fund at par (100) with interest, to April 16, only.

Coffin & Stanton also agree to surrender and deliver to the city all bonds of the City Water Company outstanding over and above the $89,000 above mentioned, and to surrender and assign to and release said city from all claims and demands against said city of Santa Cruz under their contract with said city for construction of water works.

In consideration of the above agreement, the city, on its part, agrees to pay Coffin & Stanton 3 per cent. on the par value of the refunding bonds in the event of the city availing itself of its terms, on or before April 16, 1894.

Coffin & Stanton further agrees to purchase and furnish said city with blank bonds and coupons, these to be at their own cost and expense.

Dated at Santa Cruz, February 27, 1894.

(Signed) COFFIN & STANTON.

Witness to signature:
Z. N. GOLDSBY.

128 Approved May 5, 1894.

WM. T. JETER, *Mayor.*

Attest: C. J. LINCOLN, *City Clerk.*

Nothing contained in this stipulation shall be deemed to be a waiver on the part of the defendant of its objection that the proceedings held on April 16, 1894, and April 23, 1894, have no place in such minute book, or of the objection and contention on the part of the defendant that William T. Jeter was not the mayor and that Messrs. Lucas, Hoffman, and Greene were not members of the common council of the defendant at the date of such pretended meetings.

It is further stipulated that the signatures of William T. Jeter and O. J. Lincoln, wherever the same appear upon the said minutes of the proceedings of the said common council, as hereinabove specifically set forth, are genuine.

That in the ordinance book of the defendant The City of Santa Cruz, appears the following:

Ordinance No. 314.

An ordinance calling a special election, and submitting to the qualified electors of the city of Santa Cruz the question of refunding the bonded indebtedness of said city, issuing bonds therefor and providing for the payment of the same.

Whereas, the city of Santa Cruz has an outstanding indebtedness, evidenced by bonds of said city, as follows: (1) four hundred
129 and fifty (450) bonds (with interest thereon from January 15, 1894,) dated January 15, 1889, of the denomination of $500 each, bearing interest at the rate of five per cent. per annum, payable annually, issued by said city of Santa Cruz, under the provisions of an act of the legislature of the State of California, entitled "An act *of* authorizing the incurring of indebtedness by cities, towns or municipal incorporations, incorporated under the laws of this State," approved March 15, 1887, which said bonds were heretofore sold by said city and the proceeds thereof used by said city in the purchase and construction of the city water works.

(2.) Eighty-nine (89) first-mortgage bonds (with interest thereon from November 1, 1893) of the corporation, the City Water Company of Santa Cruz, heretofore issued by said corporation, the City Water Company of Santa Cruz, which bonds bear date May 1, 1890, and are of the denomination of one thousand (1,000) dollars each, and bear interest at the rate of six (6) per cent. per annum, payable semi-annually, and are secured by a mortgage or deed of trust upon the property known as the city water works of Santa Cruz, executed by the City Water Company of Santa Cruz, as party of the first part, therein, to the Holland Trust Company of New York, as trustee, party of the second part therein; and which said bonds outstanding were, at the time of the conveyance by the City Water Company of Santa Cruz to the city of Santa Cruz, of the property known as the city water works, and now are, a valid lien and charge upon said property known as the city water works, and become thereby a part of the bonded indebtedness of the city of Santa Cruz; and

130 (3.) Sixty-five (65) municipal improvement bonds (with interest thereon from January 3, 1894) dated September 3, 1887, of the denomination of five hundred (500) dollars; and twenty-six (26) municipal improvement bonds (with interest thereon from January 3, 1894), dated September 3, 1887, of the denomination of two hundred and fifty (250) dollars each; all bearing interest at the rate of five (5) per cent. per annum, payable annually, issued by said city of Santa Cruz, under and by virtue of a certain act of the legislature of the State of California, entitled, "An act authorizing the incurring of indebtedness by cities, towns, or municipal incorporations, incorporated under the laws of this State," approved March 15, 1887.

And whereas, the common council of said city of Santa Cruz deem it for the best interest of said city of Santa Cruz, to refund

such indebtedness under the provisions of an act of the legislature of the State of California, entitled, "An act to amend an act, entitled 'An act to authorize the common council, the board of trustees, or other governing body of any incorporated city or town, other than cities of the first class, to refund its indebtedness, issue bonds therefor, and provide for the payment of the same,' approved March 15, 1883," approved March 1, 1893.

Now, therefore, the mayor and common council of the city of Santa Cruz do ordain as follows, to wit:

SECTION 1.

That a special election in and for the city of Santa Cruz, county of Santa Cruz, State of California, is hereby called and will
131 be held in said city on Tuesday, the thirteenth day of March, A. D. 1894, at which there will be submitted to the qualified electors of said city the question of refunding the bonded indebtedness of said city and issuing bonds therefor, and providing for the payment of the same.

SECTION 2.

The indebtedness of said city, which it is proposed to refund, is as follows:

(1.) Four hundred and fifty (450) bonds (with interest thereon from January 15, 1894), dated January 15, 1889, of the denomination of five hundred (500) dollars each, bearing interest at the rate of five (5) per cent. per annum, payable annually, issued by said city of Santa Cruz under the provisions of an act of the legislature of the State of California, entitled "An act authorizing the incurring of indebtedness by cities, towns, or municipal incorporations, incorporated under the laws of this State," approved March 15, 1887, which said bonds were heretofore sold by said city, and the proceeds thereof used by said city in the purchase and construction of the city water works.

(2.) Eighty-nine (89) first-mortgage bonds (with interest thereon from November 1, 1893) of the corporation, the City Water Company of Santa Cruz, heretofore issued by said corporation, the City Water Company of Santa Cruz, which bonds bear date May 1, 1890, and are of the denomination of one thousand (1,000) dollars each, and bear interest at the rate of six (6) per cent. per annum, payable semi-annually, and are securred by a mortgage or deed of trust upon the property known as the city water works
132 of Santa Cruz, executed by the City Water Company of Santa Cruz as party of the first part therein, to the Holland Trust Company of New York as trustee, party of the second part therein, and which said bonds outstanding were, at the time of the conveyance by the City Water Company of Santa Cruz to the city of Santa Cruz of the property known as the city water works, and now are, a valid lien and charge upon said property known as the city water works, and become thereby a part of the bonded indebtedness of the city of Santa Cruz; and

(3.) Sixty-five (65) municipal improvement bonds (with interest

thereon from January 3, 1894), dated September 3, 1887, of the denomination of five hundred (500) dollars each; and twenty-six (26) municipal improvement bonds (with interest thereon from January 3, 1894, dated September 3, 1887, of the denomination of two hundred and fifty (250) dollars each; all bearing interest at the rate of five (5) per cent. per annum, payable annually, issued by said city of Santa Cruz, under and by virtue of a certain act of the legislature of the State of California, entitled, "An act authorizing the incurring of indebtedness by cities, towns, or municipal incorporations, incorporated under the laws of this State," approved March 15, 1887.

The denomination, character, time of payment, rate of interest, as well as all other details of the bonds proposed to be issued for the refunding of said indebtedness are as follows:

The bonds to be issued shall be three hundred and sixty (360) in number, of the denomination of one thousand (1,000) dollars
133 each; they shall bear interest at the rate of five per cent. per annum, payable annually. They shall be of the character known as "serials," and shall be payable, principal and interest, in gold coin of the United States, in the manner following:

One-fortieth ($\frac{1}{40}$) part of the principal of the indebtedness to be incurred in the issuance of said bonds shall be payable annually, to wit: the sum of nine thousand (9,000) dollars, together with the annual interest on all sums of said indebtedness then unpaid, and said principal and interest shall be payable each and every year on a day to be fixed by the mayor and common council of said city, until the whole amount of said indebtedness is paid. The bonds to be issued shall be numbered consecutively from one to three hundred and sixty (360), both inclusive, and shall be divided into forty series, to be numbered consecutively from one (1) to forty (40), both inclusive, and consisting of nine (9) bonds each. The first series shall include those bonds which are numberrd from one to nine (9), both inclusive, and each succeeding series shall include the nine (9) bonds which are numbered consecutively after those included in the next preceding series.

The bonds included in the first of said series shall be made payable on the fifteenth day of April, A. D. 1885, and all of the remaining series shall be made payable in consecutive order on the fifteenth day of April, in each succeeding calendar year thereafter until and including the year 1934.

Said bonds shall be made payable to bearer and shall bear
134 date the sixteenth day of April, 1894, and shall be signed by the mayor and city clerk, and shall have affixed thereto the seal of the city of Santa Cruz. To each of said bonds there shall be attached interest coupons equal in number to the number of years which the bond has to run before its maturity. Each of said coupons shall represent a year's interest upon the principal amount of the bond, at the rate of five (5) per cent. per annum, viz: fifty (50) dollars, and shall be payable on the fifteenth day of April, in each calendar year. Each coupon shall be made payable to bearer, and must bear the lithographed signature of the mayor and city clerk.

Said bonds shall be substantially in the following form:

UNITED STATES OF AMERICA, *State of California.*

Bond of the City of Santa Cruz.

No. — Series —. $1,000.

Funding Bond.

The City of Santa Cruz, a municipal corporation, in the county of Santa Cruz, State of California, is indebted to, and promises to pay to the bearer, for value received, the sum of one thousand dollars (1,000) gold coin of the United States, on the fifteenth day of April, A. D. ——, with interest thereon, in like gold coin, at the rate of five per cent. per annum, payable annually on the fifteenth day of April of each calendar year from the date hereof, at the office of the city treasurer of said city of Santa Cruz, on presentation and surrender of the proper interest-bearing coupon thereto attached.

135 And for the payment of the principal sum herein named, and the interest accruing thereon, the said city of Santa Cruz is held and firmly bound, and its faith and credit and all the real and personal property of said city are hereby pledged for the prompt payment of this bond and interest at maturity.

This bond is one of a series of bonds of like date, tenor and effect, issued by the said city of Santa Cruz for the purpose of refunding the bonded indebtedness of said city and issuing bonds therefor, and providing for the payment of the same, under and in pursuance of, and in conformity with, the provisions of an act of the legislature of the State of California, entitled "An act to amend an act entitled 'An act authorizing the common council, board of trustees, or other governing body of any incorporated city or town, other than cities of the first class, to refund its indebtedness, issue bonds therefor, and provide for the payment of the same' (approved March 15, 1883)," approved March 1, 1893.

And in pursuance of and in conformity with the constitution of the State of California, and the ordinances of the city of Santa Cruz, and in pursuance of and in conformity with a vote of more than two-thirds of all the qualified electors of said city of Santa Cruz, voting at a special election duly and legally called and held and conducted, in said city, as provided under said act, on Tuesday, the thirteenth day of March, 1894, notice thereof having been duly and legally given and published in the manner as required by law, and after the result of said election had been canvassed, found and declared in the manner and as required by law.

136 And it is hereby certified and declared that all acts, conditions, and things required by law to be done precedent to and in the issue of said bonds have been properly done, happened, and performed in legal and due form, as required by law. This bond ceases to bear interest when due, unless presented for payment.

In testimony whereof, the said City of Santa Cruz, by its mayor and common council, has caused this bond to be signed by the

mayor of said city of Santa Cruz, and attested by its clerk, with the seal of said city attached, this sixteenth day of April, A. D. 1894.

—— ——,

Mayor of the City of Santa Cruz.

[SEAL.]

Attest: —— ——, *City Clerk.*

The coupons attached to said bonds shall be substantially in the following form:

Refunding bond number —. Coupon number —.

The City of Santa Cruz will pay to bearer hereof, on the fifteenth day of April, A. D. ——, at the office of the city treasurer of said city, fifty (50) dollars, gold coin of the United States, for interest on bond number —, issued sixteenth day of April, A. D. 1894.

——— ———,

Mayor of the City of Santa Cruz.

—— ——, *City Clerk.*

137 SECTION 3.

Said bonds shall be sold in such manner as may be provided by said common council, to the highest bidder, for not less than their face value, in gold coin of the United States. The proceeds of such sale shall be placed to the credit of the funding fund, and shall be applied only for the purpose of refunding the indebtedness for which said bonds shall have been issued.

SECTION 4.

In case it shall be determined to refund said bonded indebtedness and issue bonds therefor, a sinking fund shall be created for the payment of the principal of the bonds evidencing said indebtedness of three hundred and sixty thousand (360,000) dollars and the interest thereon as follows:

The common council shall, at the time of fixing the general tax levy for each year, and in the same manner for such tax levy provided, levy and collect annually each year sufficient money to pay one-fortieth part of the principal of such indebtedness, and also the annual interest on the portion remaining unpaid.

SECTION 5.

That said clerk shall prepare for each election precinct or ward in the city not less than one hundred (100) tickets for every fifty (50) or fraction of fifty (50) electors registered in such ward, to be distributed to the qualified electors of each ward as by law provided.

The ballots to be used at said election shall be of the same character as those prescribed by law to be used in other elections
138 held in such city of Santa Cruz, and have printed thereon the following caption and heading setting forth the proposition to be voted upon, to wit: "Municipal ticket;" underneath which shall be printed the respective number of the precinct or ward in which said ticket is to be voted; underneath which shall

be printed the following: "Proposition for refunding bonded in debtedness of the city of Santa Cruz to the aggregate amount three hundred and sixty thousand (360,000) dollars and issuin bonds therefor, and providing for the payment of the same;" unde neath which shall be printed, "To vote for or against refunding th indebtedness and issuing bonds therefor, and providing for the pay ment of the same, stamp a cross (X) in the square to the right and against the answer you desire to give;" underneath which shal be printed the following: "For refunding the indebtedness," etc., t the right of which shall be printed two squares, the word "Yes" i one square, with a blank square to the right of it, and the wor "No" in one square, with a blank square to the right of it.

Qualified electors at said election desiring to assent to or accep the said proposition set forth in this ordinance of refunding the in debtedness of the city, issuing bonds therefor, and providing for th payment of the same, shall in voting stamp a cross (X) in th square to the right of the word "Yes," as printed upon said ballo Qualified electors at said election desiring to reject said proposition shall in voting stamp a cross in the square to the right of the wor "No" printed upon said ballot.

139 SECTION 6.

The special election hereby called shall be held and conducted votes received and canvassed, and returns made and the results de termined according to the law governing municipal elections i this city, in the manner in which other elections are held in sai city of Santa Cruz. The polls for such election shall be opened a sunrise in the morning of said day of election, and shall close at fiv o'clock p. m. of the same day.

SECTION 7.

The voting precincts, the places of election or polling place herein are hereby established, created and designated as nearly a possible the same as those *to* created and designated by said cit council at and for the last municipal election held in said city o the eleventh day of April, 1892, and in accordance with law, an said voting precincts and polling places respectively, and the officer to conduct said election in said city at each of said voting precinct respectively shall be, and they are hereby appointed and desig nated as follows, to wit:

SECTION 8.

The places for holding said election shall be as follows:

In the first ward, at Farmers' Union building, No. 195 Pacifi avenue.

In the second ward, at the St. Charles Hotel building, No. 1 Mission street.

In the third ward, at the Young Men's Christian Association building, No. — Pacific avenue.

In the fourth ward, at Davis' building, northeast corner of Mis sion and Bay streets.

140 SECTION 9.

There are hereby appointed for the first ward:
F. B. Curtis and Fred Barson as inspectors.
F. P. Cooper and L. S. Harmon as judges.
George A. Chittenden and Harry L. Carter as clerks.
W. S. Fitch and George Birkenseer as ballot clerks of said election.
For the second ward:
Henry F. Kron and Peter R. Hinds as inspectors.
Edward Gilleran and U. S. Nichols as judges.
Will E. Grant and Edmund Jones as clerks.
J. J. C. Leonard and Vincent Nolan as ballot clerks of said election.
For the third ward:
N. P. Ingals, C. E. Huyck, as inspectors.
John Morrow, Wm. Rennie, as judges.
R. S. Miller, F. L. Stevens, as clerks.
T. J. Egan, Jos. M. Green, as ballot clerks of said election.
For the fourth ward:
Henry Schaw and A. Fridley as inspectors.
A. W. Bryant and W. H. Mason as judges.
E. M. Silvey and J. B. Harris as clerks.
L. L. Fargo and F. H. Parker as ballot clerks of said election.

SECTION 10.

The officers of the election hereinbefore named and designated must, prior to entering upon their respective duties, each take the oath of office prescribed by law for such officers of State, county, and municipal elections.

141 In case any of the officers of election so designated and appointed shall fail to attend with the qualified electors — assembled shall fill their places by appointing other competent persons from among the qualified electors present.

All returns of said special election shall be made out and signed by said officers of the special election in the usual form and deposited with the city clerk, as provided by law.

SECTION 11.

No person shall be entitled to vote at said election unless he be a qualified voter of the city of Santa Cruz.

SECTION 12.

If, upon the canvass of the returns of said election it be found that two-thirds of the voters thereat have voted in favor of refunding said indebtedness, issuing bonds therefor and providing for the payment of the same, then and thereafter said indebtedness shall be refunded, bonds issued therefor and provision made for the payment of the same, in the manner herein and as by law provided.

SECTION 13.

This ordinance shall take effect from and after its passage and approval.

I hereby certify that the foregoing ordinance No. 314 was passed and adopted by the city council of the city of Santa Cruz at the meeting thereof held this twenty-sixth day of February, A. D. 1894,
142 by the following votes: Ayes, Councilmen F. W. Lucas, J. Ho. Bailey, F. J. Hoffman, E. G. Greene; noes, none; absent, none.

O. J. LINCOLN,
[SEAL.] *City Clerk of said City of Santa Cruz.*

Approved this twenty-sixth day of February, A. D. 1894.
WILLIAM T. JETER, *Mayor.*

Attest with the seal of said city:
[SEAL.] O. J. LINCOLN, *City Clerk.*

Ordinance No. 315.

Ordinance providing for notice to be given of a special election in the city of Santa Cruz, to be held March 13, 1894, for the purpose of submitting to the qualified electors of said city the question of refunding the bonded indebtedness of said city, issuing bonds therefor, and providing for the payment of the same.

Whereas, the common council of the city of Santa Cruz deems it for the best interests of said city of Santa Cruz to refund the bonded indebtedness of said city hereinafter recited, under the provisions of an act of the legislature of the State of California, entitled "An act to amend an act entitled, 'An act to authorize the common council, board of trustees, or other governing body of any incorporated town or city, other than cities of the first class, to refund its indebtedness, issue bonds therefor, and provide for the payment of the same' (approved March 15, 1883)," approved March 1, 1893, and the mayor and common council
143 of said city of Santa Cruz did on the sixth day of February, 1894, pass an ordinance (No. 314) calling for a special election of, in and for said city of Santa Cruz, to be held on the thirteenth day of March, 1894, for the purpose of submitting to the qualified electors of said city of Santa Cruz the question of refunding the bonded indebtedness of said city of Santa Cruz, issuing bonds therefor, and providing for the payment of the same, which said ordinance is hereby specially referred to and made a part hereof.

Now, therefore, the mayor and common council of said city of Santa Cruz do ordain as follows, to wit:

SECTION 1.

The city clerk is hereby directed and ordered to cause to be published in the "Santa Cruz Surf" and "Santa Cruz Daily Sentinel," newspapers published and printed in said city of Santa

Cruz, in the county of Santa Cruz, for not less than ten (10) days before the thirteenth day of March, 1894, a notice of said special election, and to cause to be posted at each place of election, hereinafter mentioned, in said city, a notice of said special election, which said notice so published and posted shall be substantially in the words and figures following, to wit:

Notice of Special Election.

To the qualified electors of the city of Santa Cruz, and to all whom it may concern:

Notice is hereby given that a special election has been duly and regularly called and will be held in and for the city of Santa
144 Cruz, on Tuesday, the thirteenth day of March, 1894, at which there will be submitted to the qualified electors of said city the question of refunding the following bonded indebtedness of said city of Santa Cruz, issuing bonds therefor, and providing for the payment of the same, viz:

(1.) Four hundred and fifty (450) bonds (with interest thereon from January 15, 1894), dated January 15, 1889, of the denomination of five hundred (500) dollars each, bearing interest at the rate of five (5) per cent. per annum, payable annually, issued by said city of Santa Cruz, under the provisions of an act of the legislature of the State of California, entitled, "An act authorizing the incurring of indebtedness by cities, towns, or municipal incorporations, incorporated under the laws of this State," approved March 15, 1887; and which said bonds were heretofore sold by said city and the proceeds thereof used by said city in the purchase and construction of the city water works.

(2.) Eighty-nine (89) first-mortgage bonds (with interest thereon from November 1, 1893) of the corporation, the City Water Company, of Santa Cruz, heretofore issued by said corporation, the city water works, of Santa Cruz, which bonds bear date May 1, 1890, and are of the denomination of one thousand (1,000) dollars each, and bear interest at the rate of six (6) per cent. per annum, payable semi-annually, and are secured by a mortgage or deed of trust upon the property known as the city water works of Santa Cruz, executed by the City Water Company of Santa Cruz as party of the first part therein, to the Holland Trust Company of
145 New York as trustee, party of the second part therein, and which said bonds outstanding, were, at the time of the conveyance by the City Water Company of Santa Cruz to the city of Santa Cruz of the property known as the city water works, and now are, a valid lien and charge upon said property known as the city water works, and became thereby a part of the bonded indebtedness of the city of Santa Cruz; and

(3.) Sixty-five (65) municipal improvement bonds (with interest thereon from January 3, 1894), dated September 3, 1887, of the denomination of five hundred ($500) dollars, each; and twenty-six municipal improvement bonds (with interest thereon from January 3, 1894), dated September 3, 1887, of the denomination

of two hundred and fifty ($250) dollars each, all bearing interest at the rate of five (5) per cent. per annum, payable annually, issued by said city of Santa Cruz, under and by virtue of a certain act of the legislature of the State of California, entitled, "An act authorizing the incurring of indebtedness by cities, towns, or municipal incorporations, under the laws of this State," approved March 15, 1887. The denomination, character, time of payment, rate of interest, as well as all other details of the bonds proposed to be issued for the refunding of said indebtedness, are as follows:

The said bonds shall be three hundred and sixty (360) in number, and of the denomination of one thousand (1,000) dollars each; and they shall bear interest at the rate of five (5) per cent. per annum, payable annually. They shall be of the character known as "serials," and shall be payable, principal and interest, in gold coin of the United States, in the manner following:

146 One-fortieth ($\frac{1}{40}$) part of the principal of the indebtedness to be incurred in the issuing of said bonds shall be payable annually, to wit, the sum of nine thousand ($9,000) dollars, together with the annual interest on all sums of said indebtedness then unpaid, and said principal and interest shall be payable each and every year on a day to be fixed by the mayor and common council of said city until the whole amount of said indebtedness is paid. The bonds to be issued shall be numbered consecutively from one (1) to three hundred and sixty (360), both inclusive, and shall be divided into forty (40) series, to be numbered consecutively from one (1) to forty (40), both inclusive, and consisting of nine (9) bonds each. The first series shall include those bonds which are numbered from one (1) to nine (9), both inclusive, and each succeeding series shall include the nine (9) bonds which are numbered consecutively after those included in the next preceding series.

The bonds included in the first of said series shall be made payable on the fifteenth day of April, A. D. 1895, and all of the remaining series shall be made payable in consecutive order on the fifteenth day of April, in each succeeding calendar year thereafter, until and including the year 1934.

Said bonds shall be made payable to bearer, and shall bear date the sixteenth day of April, 1894, and shall be signed by the mayor and city clerk, and shall have affixed thereto the seal of the city of Santa Cruz. To each of said bonds there shall be attached interest coupons equal in number to the number of years which the bond

147 has to run before its maturity. Each of said coupons shall represent a year's interest upon the principal amount of the bond, at the rate of five (5) per cent. per annum, viz: fifty ($50) dollars, and shall be payable on the fifteenth day of April in each calendar year. Each coupon shall be made payable to bearer, and must bear the lithographed signatures of the mayor and city clerk.

Said bonds shall be substantially in the following form:

UNITED STATES OF AMERICA, *State of California.*

Bond of the City of Santa Cruz.

No. —. Series —. $1,000.

Refunding Bond.

The City of Santa Cruz, a municipal corporation in the county of Santa Cruz, State of California, is indebted to, and promises to pay to the bearer, for value received, the sum of one thousand (1,000) dollars, gold coin of the United States, on the fifteenth day of April, A. D. ——, with interest thereon in like gold coin, at the rate of five (5) per cent. per annum, payable annually on the fifteenth day of April of each calendar year from the date hereof, at the office of the city treasurer of said city of Santa Cruz, on presentation and surrender of the proper interest-bearing coupon hereto attached.

And for the payment of the principal sum herein named, and the interest accruing thereon, the said City of Santa Cruz is held and firmly bound, and its faith and credit and all the real and
148 personal property of said city are hereby pledged for the prompt payment of this bond and interest at maturity. This bond is one of a series of like date, tenor, and effect, issued by the said city of Santa Cruz for the purpose of refunding the bonded indebtedness of said city and issuing bonds therefor, and providing for the payment of the same, under and in pursuance of, and in conformity with the provisions of an act of the legislature entitled "An act authorizing the common council, board of trustees, or other governing body of any incorporated city or town, other than cities of the first class, to refund its indebtedness, issue bonds therefor, and provide for the payment of the same," (approved March 15, 1883), approved March 1, 1893.

And in pursuance of and in conformity with the constitution of the State of California, and the ordinances of the city of Santa Cruz, and in pursuance of and in conformity with a vote of more than two-thirds of all the qualified electors of said city of Santa Cruz, voting at a special election duly and legally called and held and conducted in said city as provided under said act, on Tuesday, the thirteenth day of March, 1894, notice thereof having been duly and legally given and published in the manner as required by law, and after the result of said election had been canvassed, found and declared in the manner and as required by law.

And it is hereby certified and declared that all acts, conditions, and things required by law to be done precedent to and in the issue of said bonds, have been properly done, happened, and performed in legal and due form, as required by law. This bond ceases to bear interest when due, unless presented for payment.

149 In testimony whereof, the said city of Santa Cruz, by its mayor and common council, has caused this bond to be signed by the mayor of said city of Santa Cruz and attested by its

said clerk, with the seal of said city attached, this sixteenth day of April, A. D. 1894.

——— ———,
Mayor of the City of Santa Cruz.

[SEAL.]
Attest: ——— ———, *City Clerk.*

The coupons attached to said bonds shall be substantially in the following form:

Refunding bond number —. Coupon number —.

The City of Santa Cruz will pay to bearer hereof, on the fifteenth day of April, A. D. ———, at the office of the city treasurer of said city, fifty ($50) dollars, gold coin of the United States, for interest on bond numbered —, issued sixteenth day of April, A. D. 1894.

——— ———,
Mayor of the City of Santa Cruz.
——— ———, *City Clerk.*

Said bonds shall be sold in such manner as may be provided by said common council, to the highest bidder, for not less than their face value, in gold coin of the United States. The proceeds of such sale shall be placed to the credit of the funding fund and
150 shall be applied only for the purpose of refunding the indebtedness for which said bonds shall have been issued.

In case it shall be determined to refund said bonded indebtedness and issue bonds therefor, a sinking fund shall be created for the payment of the principal of the bonds evidencing said indebtedness of three hundred and sixty thousand ($360,000) dollars, and interest thereon, as follows:

The common council shall, at the time of fixing the general tax levy for each year, and in the same manner for such tax levy provided, levy and collect annually each year sufficient money to pay one-fortieth ($\frac{1}{40}$) part of the principal of such indebtedness, and also the annual interest on the portion remaining unpaid.

Said clerk shall prepare for each ward in the city not less than one hundred tickets for every fifty or fraction of fifty electors registered in said ward, to be distributed to the qualified electors of each ward as by law provided.

The ballots to be used at said election shall be of the same character as those prescribed by law to be used in other elections held in such city of Santa Cruz, and shall have printed thereon the following caption and heading, setting forth the proposition to be voted upon, to wit:

"Municipal ticket," underneath which shall be printed the respective number of the ward in which said ticket is to be voted; underneath which shall be printed the following: "Proposition for refunding bonded indebtedness of the city of Santa Cruz, to the aggregate amount of three hundred and sixty thousand ($360,000) dollars, and issuing bonds therefor and providing for the
151 payment of the same;" underneath which shall be printed: "To vote for or against refunding the indebtedness and

issuing bonds therefor, and providing for the payment of the same, stamp a cross (X) in the square to the right of and against the answer you desire to give;" underneath which shall be printed the following: "For refunding the indebtedness," etc., to the right of which shall be printed two (2) squares, the word "Yes" in one square, with a blank square to the right of it, and the word "No" in one square, with a blank square to the right of it.

Qualified electors at said election desiring to assent to or accept the said proposition set forth herein for refunding the indebtedness of the city, issuing bonds therefor, and providing for the payment of the same, shall, in voting, stamp a cross (X) in a square to the right of the word "Yes," as printed upon said ballot. Qualified electors at said election desiring to reject said proposition shall, in voting, stamp a cross (X) in the square to the right of the word "No," as printed upon said ballot.

Said election shall be held and conducted, votes received and canvassed, and returns made and the results determined, according to the law governing municipal elections in said city, in the same manner in which other elections are held in said city of Santa Cruz. The polls of such election shall be opened at sunrise in the morning of said day of election and shall close at five o'clock p. m. of the same day.

The voting precincts, places of election or polling places at which polls will be opened in said city of Santa Cruz for the pur-
152 pose of voting at said election, and the officers of election designated and appointed to conduct the said election therein, are hereby established and defined and appointed as follows, to wit:

SECTION 2.

The places for holding said election shall be as follows:

In the first ward, at the Farmers' Union building, No. 195 Pacific avenue.

In the second ward, at the St. Charles Hotel building, No. 13 Mission street.

In the third ward, at Young Men's Christian Association building, No. — Pacific avenue.

In the fourth ward, at Davis' building, northeast corner of Mission and Bay streets.

SECTION 3.

There are hereby appointed for the first ward:

F. B. Curtis and Fred Barson as inspectors.

F. P. Cooper and L. S. Harmon as judges.

George A. Chittenden and Henry L. Carter as clerks.

W. S. Fitch and George Birkenseer as ballot clerks of said election.

For the second ward:

Henry F. Kron and Peter R. Hines as inspectors.

Edward Gilleran and U. S. Nichols as judges.

Will E. Grant and Edmund Jones as clerks.

J. J. C. Leonard and Vincent Nolan as ballot clerks of said election.

For the third ward:

N. P. Ingals and C. E. Huyck as inspectors.

John Morrow and Wm. Rennie as judges.

153 R. S. Miller and F. B. Stevens as clerks.

T. J. Egan and Jos. M. Green as ballot clerks of said election.

For the fourth ward:

Henry Shaw and A. Fridley as inspectors.

A. W. Bryant and W. H. Mason as judges.

E. M. Silvey and J. B. Harris as clerks.

L. L. Fargo and F. H. Parker as ballot clerks of said election.

The officers of election hereinbefore named and designated must, prior to entering upon their respective duties, each take the oath of office prescribed by law for such officers of State, county and municipal elections.

In case any of the officers of election so designated and appointed shall fail to attend, those attending with the qualified electors assembled shall fill their places by appointing other competent persons from among the qualified electors present.

All returns of said special election shall be made out and signed by said officers of the special election in the usual form and deposited with the city clerk, as provided by law.

No person shall be entitled to vote at said election unless he be a qualified elector of the city of Santa Cruz.

If, upon the canvass of the returns of said election it be found that two-thirds of the votes voting thereat have voted in favor of refunding said indebtedness, issuing bonds therefor, and providing for the payment of the same, then and thereafter said indebtedness shall be refunded, bonds issued therefor, and provisions made

154 for the payment of the same, in the manner herein and as by law provided.

SECTION 4.

This ordinance shall take effect from and after its passage and approval.

I hereby certify that the foregoing ordinance was passed and adopted by the city council of the city of Santa Cruz, at the meeting thereof held this twenty-sixth day of February, A. D. 1894, by the following votes: Ayes, Councilmen F. W. Lucas, J. Ho. Bailey, F. J. Hoffman, E. G. Greene; noes, none; absent, none.

[SEAL.] O. J. LINCOLN,
City Clerk of said City of Santa Cruz.

Approved this twenty-sixth day of February, A. D. 1894.
WM. T. JETER, *Mayor.*

Attest with seal of said city:

[SEAL.] O. J. LINCOLN, *City Clerk.*

Ordinance No. 317.

An ordinance declaring the result of the special election held in the city of Santa Cruz on Thursday, the thirteenth day of March, for the purpose of submitting to the qualified electors of said city of Santa Cruz the question of refunding the bonded indebtedness of said city of Santa Cruz, issuing bonds therefor, and providing for the payment of the same.

155 The mayor and common council of the city of Santa Cruz do ordain as follows:

SECTION 1.

That a special election was held in the city of Santa Cruz, on Tuesday, the thirteenth day of March, 1894, in pursuance of and in conformity with an ordinance of the city of Santa Cruz, entitled "ordinance No. 315," providing for notice to be given of a special election in the city of Santa Cruz, to be held March 13, 1894, for the purpose of submitting to the qualified electors of said city of Santa Cruz the question of refunding the bonded indebtedness of said city, issuing bonds therefor, and providing for the payment of the same," passed and approved on the twenty-sixth day of February, 1894, and in pursuance of and in conformity with a notice of special election, duly given, published and posted, as provided by law, and by said ordinance, and after all steps and proceedings required by law to precede such election had been had and taken, as in the manner and at the times provided by law, and in strict conformity with law, for the purpose of submitting to the qualified electors of the city of Santa Cruz the question of refunding the bonded indebtedness of said city, issuing bonds therefor, and providing for the payment of the same.

SECTION 2.

That the returns of such election have been duly, legally and regularly made and filed with the city clerk by the proper boards and officers of said election, and such returns have been duly
156 opened and canvassed by the mayor and common council of said city of Santa Cruz, sitting as a canvassing board of said election, who have *been* regularly met for the purpose, and the result is hereby declared to be as follows, viz:

At the election held in the city of Santa Cruz on Tuesday, the thirteenth day of March, 1894, for the purpose of submitting to the qualified electors of the city of Santa Cruz the question of refunding the bonded indebtedness of said city, issuing bonds therefor, and providing for the payment of the same, there were cast 595 votes, of which number of votes so cast, 538 votes were cast in favor of the proposition, "for refunding the bonded indebtedness of the city of Santa Cruz to the aggregate amount of $360,000 and issuing bonds therefor, and providing for the payment of the same;" and 57 votes were cast against the proposition, "for refunding bonded indebtedness of the city of Santa Cruz to the aggregate amount of $360,000

and issuing bonds therefor, and providing for the payment of the same," and the mayor and common council of said city of Santa Cruz do hereby find and declare that the proposition, "for refunding bonded indebtedness of the city of Santa Cruz to the aggregate amount of $360,000, and issuing bonds therefor, and providing for the payment of the same," was carried by a vote *for* more than two-thirds of the qualified electors of said city of Santa Cruz voting at said election, and that more than two-thirds of the votes cast at said election were cast in favor of refunding the bonded indebtedness of the city of Santa Cruz to the aggregate amount of $360,000 and issuing bonds therefor, and providing for the payment of the same.

157 SECTION 3.

This ordinance shall take effect from and after its passage and approval.

I hereby certify that the foregoing ordinance No. 317 was passed and adopted by the city council of the city of Santa Cruz at the regular adjourned meeting thereof, held this fifteenth day of March, A. D. 1894, by the following votes: Ayes, Councilmen F. W. Lucas, J. H. Bailey, F. J. Hoffman, E. G. Greene; noes, none; absent, none.

[SEAL.] O. J. LINCOLN, *City Clerk.*

Approved this fifteenth day of March, A. D. 1894.

WM. T. JETER, *Mayor.*

[SEAL.] O. J. LINCOLN, *City Clerk.*

Ordinance No. 318.

An ordinance declaring the result of the special election held in the city of Santa Cruz on Thursday, the thirteenth day of March, for the purpose of submitting to the qualified electors of said city of Santa Cruz the question of refunding the bonded indebtedness of said city of Santa Cruz, issuing bonds therefor, and providing for the payment of the same.

The mayor and common counsel of the city of Santa Cruz do ordain as follows:

158 SECTION I.

That a special election was held in the city of Santa Cruz on Tuesday, the thirteenth day of March, 1894, in pursuance of and in conformity with an ordinance of the city of Santa Cruz, entitled "ordinance No. 315, providing for notice to be given of a special election in the city of Santa Cruz, to be held March 13, 1894, for the purpose of submitting to the qualified electors of said city of Santa Cruz the question of refunding the bonded indebtedness of said city, issuing bonds therefor, and providing for the payment of the same," passed and approved on the twenty-sixth day of February, 1894, and in pursuance of, and in conformity with, a notice of special

election duly given, published and posted as provided by law, and by said ordinance, and after all steps and proceedings required by law to precede such election had been had and taken, and in the manner and at the times provided by law, and in strict conformity with law, for the purpose of submitting to the qualified electors of the city of Santa Cruz the question of refunding the bonded indebtedness of said city, issuing bonds therefor, and providing for the payment of the same.

SECTION II.

That the returns of such election have been duly, legally and regularly made and filed with the city clerk by the proper boards and officers of said election, and such returns have been duly opened and canvassed by the mayor and common council of said city of Santa Cruz, sitting as a canvassing board of said elec-
159 tion, who have *been* regularly met for the purpose and the result is hereby declared to be as follows, viz:

At the election held in the city of Santa Cruz, on Tuesday, the thirteenth day of March, 1894, for the purpose of submitting to the qualified electors of the city of Santa Cruz the question of refunding the bonded indebtedness of said city, issuing bonds therefor, and providing for the payment of the same, there were cast 595 votes, of which number of votes so cast, 538 votes were cast in favor of the proposition, "for refunding bonded indebtedness of the city of Santa Cruz to the aggregate amount of $360,000, and issuing bonds therefor, and providing for the payment of the same," and 57 votes were cast against the proposition, "for refunding bonded indebtedness of the city of Santa Cruz to the aggregate amount of $360,000 and issuing bonds therefor, and providing for the payment of the same," and the mayor and common council of said city of Santa Cruz do hereby find and declare that the proposition "for refunding bonded indebtedness of the city of Santa Cruz to the aggregate amount of $360,000, and issuing bonds therefor, and providing for the payment of the same," was carried by a vote of more than two-thirds of the qualified electors of said city of Santa Cruz, voting at said election, and that more than two-thirds of the vote- cast at said election were cast in favor of refunding the bonded indebtedness of the city of Santa Cruz, to the aggregate amount of $360,000, and issuing bonds therefor, and providing for the payment of the same.

160 SECTION III.

This ordinance shall take effect from and after its passage and approval.

I hereby certify that the foregoing ordinance, No. 318, was passed and adopted by the city council of the city of Santa Cruz, at the regular adjourned meeting thereof, held this nineteenth day of March, A. D., 1894, by the following votes: Ayes—Councilmen F. W. Lucas, J. H. Bailey, F. J. Hoffman, E. G. Greene. Noes—none. Absent—none.

[SEAL.] C. F. LINCOLN, *City Clerk.*

Approved this nineteenth day of March, A. D. 1894.

WM. T. JETER, *Mayor.*

O. J. LINCOLN, *City Clerk.* [SEAL.]

Ordinance No. 320.

An ordinance providing for refunding the bonded indebtedness of the city of Santa Cruz, issuing bonds therefor, providing for the payment of the same, and for the sale, and the manner of sale, of the bonds so issued, and directing the city clerk to give notice inviting sealed proposals for the sale of the bonds so issued, and, also, providing for the disposition of the funds derived from the sale of the bonds so issued.

Whereas, a special election was held in the city of Santa
161 Cruz, on Tuesday, the thirteenth day of March, 1894, pursuant to the provisions of an act of the legislature of the State of California, entitled "An act to amend an act, entitled 'An act to authorize the common council, board of trustees, or other governing body of any incorporated city or town, other than cities of the first class, to refund its indebtedness, issue bonds therefor, and provide for the payment of the same,' (approved March 15, 1883)," with ordinance No. 314 of said city of Santa Cruz, entitled "An ordinance calling a special election and submitting to the qualified electors of the city of Santa Cruz the question of refunding the bonded indebtedness of said city issuing bonds therefor, and providing for the payment of the same," passed and approved February 25, 1894; and, also, in accordance with ordinance No. 315 of said city of Santa Cruz, entitled: "An ordinance providing for notice to be given of a special election in the city of Santa Cruz, to be held March 13, 1894, for the purpose of submitting to the qualified electors of said city the question of refunding the bonded indebtedness of said city, issuing bonds therefor, and providing for the payment of the same," passed and approved February 26, 1894, and

Whereas, notice of said special election was duly given as provided by law, and said ordinance No. 315, and

Whereas, said notice of such special election recited the indebtedness to be refunded, together with the denomination, character, time of payment, rate of interest, as well as all other details of the bonds proposed to be issued as provided by law; and, also, fully set forth and described the indebtedness proposed to be refunded; and

said special election was duly held after all steps, acts, con-
162 ditions, proceedings and things required by law to precede such election had been duly had, taken and done as and in the manner, and at the times provided by law, and in strict conformity with law; and whereas more than two-thirds of the qualified electors of said city of Santa Cruz voting at said special election voted in favor of the refunding of the bonded indebtedness of said city to the aggregate amount of $360,000, and issuing bonds therefor, and providing for the payment of the same; and

Whereas, all acts, conditions, and things required by law to be done precedent to the issue of the bonds herein ordained to be issued have been properly done, happened and performed in legal and due form as required by law.

Now, therefore, the mayor and common council of the city of Santa Cruz do ordain as follows, to wit:

SECTION I.

There shall be issued by the city of Santa Cruz three hundred and sixty (360) bonds of the denomination of one thousand (1,000) dollars each, bearing interest at the rate of five per cent. per annum, payable annually. Said bonds shall be of the character known as "serials," and shall be payable principal and interest in gold coin of the United States, in the manner following:

One-fortieth part of the principal of the indebtedness to be incurred shall be payable annually, to wit: the sum of $9,000, together with the annual interest on all sums of said indebtedness then unpaid, until the whole amount of said indebtedness is paid.

The bonds to be issued shall be numbered consecutively from
163 one to three hundred and sixty, both inclusive, and shall be divided into forty serials, to be numbered consecutively from one to forty, both inclusive, and consisting of nine bonds each. The first series shall include those bonds which are numbered from one to nine, both inclusive, and each succeeding series shall include nine bonds, which are numbered consecutively after those included in the next preceding series. The bonds included in the first of said series shall be made payable on the fifteenth day of April, A. D. 1893, and all of the remaining series shall be made payable, one series in each year, in consecutive order on the fifteenth day of April in each succeeding calendar year thereafter until and including the year 1934.

Said bonds shall be made payable to bearer and shall bear date of the sixteenth day of April, 1894, and shall be signed by the mayor and city clerk, and shall have affixed thereto the seal of the city of Santa Cruz.

To each of said bonds there shall be attached interest coupons equal in number to the number of years which the bond has to run before its maturity.

Each of said coupons shall represent one year's interest upon the principal amount of the bond, at the rate of five per cent. per annum, viz: fifty dollars, and one of said coupons shall be payable on the fifteenth day of April, in each calendar year. Each coupon shall be made payable to bearer and must bear the lithographed signatures of the mayor and city clerk. Said bonds shall be substantially in the following form:

164 UNITED STATES OF AMERICA, *State of California.*

Bond of the City of Santa Cruz.

"No. —. Series —. $1,000.

Refunding Bond.

The City of Santa Cruz, a municipal corporation in the county of Santa Cruz, State of California, is indebted to and promises to pay to the bearer, for value received, the sum of one thousand dollars, gold coin of the United States, on the fifteenth day of April, A. D. ——, with interest thereon, in like gold coin, at the rate of five per cent. per annum, payable annually on the fifteenth day of April each calendar year, from the date hereof, at the office of the city treasurer of said city of Santa Cruz, on presentation and surrender of the proper interest-bearing coupon hereto attached.

And for the payment of the principal sum herein named and the interest accruing thereon, the said city of Santa Cruz is held and firmly bound and its faith and credit and all the real and personal property of said city are hereby pledged for the prompt payment of this bond and interest at maturity.

This bond is one of a series of bonds of like date, tenor, and effect, issued by the said city of Santa Cruz for the purpose of refunding the bonded indebtedness of said city and issuing bonds therefor, and providing for the payment of the same, under and in pursuance of, and in conformity with, the provisions of an act of the legislature of the State of California, "An act to amend an act entitled,
165 'An act authorizing the common council, board of trustees, or other governing body, of any incorporated city, or town, other than cities of the first class, to refund its indebtedness, issue bonds therefor, and provide for the payment of the same,' (approved March 15, 1883,)" approved March 1, 1893.

And in pursuance of and in conformity with the constitution of the State of California, and *in* the ordinance of the city of Santa Cruz, and in pursuance of, and in conformity with, a vote of more than two-thirds of all the qualified electors of said city of Santa Cruz, voting at a special election, duly and legally called and held and conducted in said city, as provided under said act, on Tuesday, the thirteenth day of March, 1894, notice thereof having been duly and legally given and published in the manner as required by law and after the result of said election had been duly canvassed, found, and declared in the manner and as required by law.

And it is hereby certified and declared that all acts, conditions and things required by law to be done precedent to and in the issue of said bonds have — properly done, happened, and performed in legal and due form and as required by law.

This bond ceases to bear interest when due, unless presented for payment.

In testimony whereof the said City of Santa Cruz, by its mayor

and common council, has caused this bond to be signed by the
166 mayor of said city and attested by its said clerk, with the seal of said city attached, this sixteenth day of April, A. D. 1894.

——— ———,
Mayor of the City of Santa Cruz.

———— ————, *City Clerk.*

The coupons attached to said bonds shall be substantially in the following form:

Refunding bond number —. Coupon number —.

The City of Santa Cruz will pay to the bearer hereof, on the fifteenth day of April, A. D. —, at the office of the city treasurer of said city, fifty dollars, gold coin of the United States, for interest on bond number —, issued sixteenth day of April, A. D. 1894.

——— ———,
Mayor of the City of Santa Cruz.

———— ————, *City Clerk.*

The city clerk is hereby authorized and required to cause to be prepared and lithographed upon linen parchment, of the most suitable quality therefor, three hundred and sixty blank bonds, with coupons attached, of the form and denomination herein specified and provided for, sufficient in number, and have the same ready for execution on behalf of the city, on or before the sixteenth day of April, A. D. 1894.

SECTION III.

The city clerk is hereby directed to cause to be published
167 in the "Santa Cruz Surf" and "Santa Cruz Daily Sentinel," newspapers printed and published in the city of Santa Cruz, and, also, in the "San Francisco Chronicle," a newspaper printed and published in the city and county of San Francisco, State of California, daily, for a period of fifteen days next preceding and up to the sixteenth day of April, 1894, a notice of the intention of the mayor and common council of the city of Santa Cruz to sell said bonds herein ordained to be issued and stating that sealed bids for the purchase of said bonds, or any number thereof, will be received by the city clerk, on behalf of the mayor and common council of said city, at the office of the city clerk, in said city of Santa Cruz, from the first publication of said notice up to the hour of 2 o'clock p. m. on the sixteenth day of April, 1894, and that thereafter said bonds will be sold by the mayor and common council to the highest bidder, for not less than their face value, in United States gold coin, to be paid on delivery of said bonds, at the city treasurer's office in said city of Santa Cruz.

Said notice shall also state that the mayor and common council reserve the right to accept any portion of any bid, and also to reject any and all bids, or any portion of any bid and, also, that no bid will be considered that is for less than the face value of the bonds bid for; said notice shall also state the number and denomi-

nation of said bonds, the number of series thereof, and the length of time that the several series have to run before becoming due; that each bid must be accompanied by a certified check on the bank of Santa Cruz county, of the city of Santa Cruz, payable to the order of the mayor of the city of Santa Cruz, for five per cent. of the
168 amount bid by the bidder, as a guarantee on the part of the bidder that in case his bid is accepted he will, within twenty days after receiving notice of the readiness on the part of the mayor and common council to deliver said bonds, take and pay for the same as delivered according to the terms of the notice of sale; and that in case of the failure of any bidder whose bid shall be accepted for said bonds, or any part thereof, to take and pay for the bonds for which his bid may be accepted, within said time named, his check shall be collected by said mayor and the money collected thereon shall be paid to the city of Santa Cruz as liquidated damages accruing to said city of Santa Cruz against said defaulting bidder.

All checks of bidders, whose bids shall not be accepted, will be returned to them. That the deposit in United States post-office, at the city of Santa Cruz, of a notice of readiness to deliver said bonds, signed by the city clerk with the seal of the city affixed, and addressed and directed to the purchaser of said bonds, at his place of residence, as given in his bid, shall be deemed and taken as notice to the purchaser from the date of such deposit; and the purchaser's assent to the form of notice herein provided for shall be embodied in his bid.

SECTION IV.

There shall be levied and collected, annually, for the term of forty (40) years, by the proper authorities of the city of Santa Cruz, at the time of the levy and collection of the general taxes of the city of Santa Cruz, and in the same manner as for such levy and
169 collection provided, a special tax sufficient to pay the annual interest, as it falls due, upon the portion of said bonds remaining unpaid, and, also, sufficient to pay one-fortieth part of the principal of said bonds. The moneys so collected for the payment of the principal sum of said bonds shall constitute a sinking fund for the payment of the principal sum of said bonds, as the same falls due, and with which said principal sum shall be paid, as the same falls due, as follows, to wit:

Nine thousand dollars ($9,000) of such principal sum on the fifteenth day of April, 1895, and $9,000 of such principal sum on the fifteenth day of April of each year thereafter, until the whole of the principal sum of $360,000 is paid; and the said city of Santa Cruz shall and will pay said bonds and the interest thereon to the holders and owners thereof, as the same falls due.

SECTION V.

The proceeds of the sale of the bonds herein ordained to be issued shall be placed in the city treasury, to the credit of the funding fund, which is hereby created, and shall be applied only for the

purpose of refunding the bonded indebtedness of said city of Santa Cruz, for which they have been issued.

SECTION VI.

Whenever sufficient money is in the funding fund, in the hands of the city treasurer, to redeem one or more of the outstanding bonds to be refunded, the city treasurer shall publish once a week, for two weeks, in some newspaper of general circulation, published in the city of Santa Cruz, if there be any, a notice to the effect
170 that he is prepared to pay such bond or bonds (giving the number thereof), and if the same are not presented for redemption within thirty days after the first publication of such notice the interest on such bonds will cease. The city treasurer shall, at the same time, deposit in United States post-office, in the city of Santa Cruz, a copy of such notice, enclosed in a sealed envelope with the postage paid thereon, addressed to the owner and owners of such bonds at the post-office address of such owner and owners, as shown by the record thereof kept in the city treasurer's office.

If such bond or bonds are not presented within the time specified in such notice the interest thereon shall then cease and the amount due be set aside for the payment of the same whenever presented. All redemption of bonds shall be made according to the priority in the order of their issuance, beginning at the first number. Whenever such outstanding bonds are surrendered and paid, the city treasurer shall proceed to cancel the same by endorsing on the face thereof the amount for which they are received, the word "cancelled" and the date of cancellation. The city treasurer shall also keep a record of such bonds so redeemed and shall make a report of the same to the mayor and common council, at least once a month, accompanying the same therewith by the bonds which have been taken up and cancelled.

SECTION VII.

All moneys which shall remain in said funding fund after all the outstanding bonds to be refunded hereunder have been taken
171 up and cancelled, shall be paid into the general fund of the city of Santa Cruz and become a part thereof.

SECTION VIII.

This ordinance shall take effect from and after its passage and approval.

I hereby certify that the foregoing ordinance, No. 320, was passed and adopted by the city council of the city of Santa Cruz at the regular adjourned meeting thereof, held this twentieth day of March, A. D. 1894, by the following vote. Ayes—Councilmen F. W. Lucas, J. H. Bailey, F. J. Hoffman, E. G. Greene. Noes—None. Absent—None.

[SEAL.] O. J. LINCOLN, *City Clerk.*

Approved this twenty-sixth day of March, A. D. 1894.
WM. T. JETER, *Mayor.*

Attest with seal of said city.
[SEAL.] O. J. LINCOLN, *City Clerk.*

That the signature- of W. T. Jeter and W. J. Lincoln, wherever the same appear upon such ordinance record of the defendant, are genuine.

That a copy of ordinance No. 315, and the whole thereof, in the form hereinbefore set forth, was caused by the city clerk to be published, and was published in the "Santa Cruz Daily Sentinel," a newspaper published and printed in said city of Santa
172 Cruz, for not less than ten days before the thirteenth day of March, 1894, to wit: on the twenty-eighth day of February, 1894, the first, second, third, fourth, sixth, seventh, eighth, ninth, tenth, eleventh, and thirteenth days of March, 1894, being every day between said dates of February 28, 1894, and March 13, 1894, both inclusive, upon which said paper was published; and a copy of said ordinance No. 315, in similar form, was by the city clerk caused to be published, and was published, in the "Santa Cruz Surf," a newspaper published and printed in said city of Santa Cruz, not less than ten days before the thirteenth day of March, 1894, to wit: upon the twenty-eighth day of February, the first, second, third, fifth, sixth, seventh, eighth, ninth, tenth, twelfth and thirteenth days of March, 1894, said days being all the days between the twenty-eighth day of February and the thirteenth day of March, 1894, both inclusive, upon which said paper the "Santa Cruz Surf" was published; and that a copy of said ordinance No. 315, in similar form, was by said city clerk caused to be posted, and was posted, for more than ten days before the thirteenth day of March, 1894, at each of the places of election mentioned in said ordinance No. 315, to wit: at Farmers' Union building, No. 195 Pacific avenue; at the St. Charles Hotel building, No. 13 Mission street; at Young Men's Christian Association building, northeast corner of Mission and Bay streets, all in said city of Santa Cruz.

That no notice of said special election was ever publish-, posted, made, or given otherwise than as specifically stated in this stipulation.

173 That on March 13, 1894, the so-called special election was held, but nothing herein contained shall be deemed to be a waiver of defendant's objection and contention that such election was entirely illegal and void.

That less than one-half of the qualified electors of said defendant, as the same appeared on the great register of the county of Santa Cruz, at the general election last preceding, namely, 595 out of a total of 1,452 qualified electors, voted at such so-called special election.

That the polls at such so-called election were closed at 5 p. m., and that sundown of said March 13, 1894, occurred at six fifteen p. m.

And, whereas, pursuant to the stipulation of the parties, certain depositions of witnesses have been taken on behalf of the plaintiff—

It is now stipulated and agreed that the witnesses testifying in such depositions, testified respectively to the following effect, to wit:

That JOHN BRANCH, being duly sworn, in the city of Boston, State of Massachusetts, on the seventeenth day of September, 1896, testified as follows:

Direct examination:

I am treasurer of the People's Trust Company of St. Albans, Vt. I have been the owner of one of the municipal bonds, purporting to be executed by the defendant on April 16, 1894, that is bond No. 297 for $1,000, principal due 1927. About September 1, 1894, I had $1,000 that I wanted to invest in some strong municipal bond, and about that time a representative of Coffin & Stanton, a bond
174 house, as I supposed of good repute in New York, offered me a Santa Cruz bond, having a long time to run, bearing five per cent. at par, and accrued interest at one hundred and one, less one per cent. commission, and I thought the bond was a good purchase, because the bond was a refunding bond, and also from their financial statement. I ordered the bond, and on September 10, received it, with a draft attached for $1,029.36, which was at the rate of one hundred and one and interest. I paid the draft, and Coffin & Stanton refunded me $10. I have been the owner of that bond ever since. I assigned the first coupon, due on the fifteenth day of April, 1895, by instrument in writing, to Albert H. Waite, of Worcester, Massachusetts. When I purchased it, I made no inquiries in regard to the outstanding indebtedness of the city of Santa Cruz, to refund which this series of bonds was issued, nor did I make any inquiry in regard to the title of Coffin & Stanton, or any of the members of that firm to the bond, and had no knowledge in regard to their title from any source other than inquiries made by me.

I had no knowledge relative to the condition of the outstanding indebtedness of the city of Santa Cruz further than the published statement made by Coffin & Stanton of the indebtedness, together with the assessed valuation and population, etc., the usual statement furnished by bond houses. I have not that statement with me. I do not know where it is.

Cross-examination:

The People's Trust Company of St. Albans had no business relations with Coffin & Stanton at that time. The only time
175 that they did have any was in 1887 or '88, when we purchased of them some Iowa county bonds. It has never acted in any capacity as agent or otherwise for Coffin & Stanton. Individually, I had no business relations with Coffin & Stanton prior to the purchase of this Santa Cruz bond. Mr. Terrill called on me on behalf of Coffin & Stanton. I don't think that he gave me any information either in writing or orally about the character

of the bonds. I think he merely presented his circular of offerings. Mr. Terrill did present a financial statement or circular to me. I saw that before offering. It was the usual financial statement offered by bond houses, giving, as I remember, the assessed value, the bonded debt and the population. I was afterwards furnished by Coffin & Stanton with copies of opinion of attorneys. The Santa Cruz attorney's name was Goldsby. My recollection is that they were both California attorneys. I think that the opinion which you show me purporting to be a certified copy of the opinion on the validity of these bonds, signed by Z. N. Goldsby, is a copy of the opinion I saw. The opinions were sent to me with the bond. I examined them practically at the same time I paid for the bond. I felt that the house of Coffin & Stanton was a reputable house; that I knew about Santa Cruz, and that an obligation against them was good, so I bought the bond in good faith, believing that it was good, and would be paid.

The only representations upon which I acted were those made in the financial statement, and in the opinions of these attorneys, and with an idea I got somewhere that Santa Cruz was a city of
176 about eight thousand inhabitants, similar to St. Albans, with a bonded debt of something under $400,000. That is about the debt of St. Albans. The population is about the same, and I regarded our bonds as very good. If I had known that the bonded debt was some $700,000, I would not have thought so well of it.

That JOHN M. GRAHAM, being duly sworn, at the city of Boston, State of Massachusetts, on the fifteenth day of September, 1896, testified as follows:

I am president of the International Trust Company of Boston. That company came into possession of sixteen municipal bonds purporting to be executed by the officers of the city of Santa Cruz on the sixteenth day of April, 1894, being numbers 10, 11, 12, 14, 91, 92, 93, 118, 119, 120, 121, 122, 123, 124, 125, and 126. These bonds were lodged with the International Trust Company as collateral security for a note dated New York, June 20, 1894, payable four months after date, no grace, for $50,000, signed by Coffin and Stanton; $12,000 of the bonds were deposited as collateral at the time of the execution of said note; $4,000 was subsequently lodged with me as collateral in lieu of $4,000 of Illinois Central Railroad 4's, released in exchange for the said $4,000 Santa Cruz bonds—that is, the four bonds of the Illinois Central were pledged at the time of the execution of the note, and were afterward surrendered and the other four Santa Cruz bonds accepted in their place. At the time of the execution of this note, the International Trust Company loaned the money expressed therein. It has never been paid. The International Trust Company is still in possession of these bonds.

177 At the time the International Trust Company made the loan to Coffin & Stanton, it had no notice or knowledge of the title of Coffin & Stanton of those bonds, beyond the fact that they were offered by Coffin & Stanton as collateral with their note,

and were, in fact, delivered with the note. It had no notice of any fact which would tend to show in any way a want of title on the part of Coffin & Stanton, nor any knowledge or notice of the financial condition of the city of Santa Cruz, beyond representations made at the time the bonds were delivered to us with the note that the bonds were regular and valid, and in accordance with the certificate on the face of the bonds signed by the officers of the city. It had no notice of the financial condition of the defendant further than that the bonds were regular and valid, and in accordance with the certificate on the face of the bonds signed by the officers of the city. It had no notice of the financial condition of the defendant further than that the bonds were represented to be good and valid and worth a premium. No statement was made to the International Trust Co. in regard to the exact condition of the indebtedness of the city.

The note has not been paid, with the exception of certain credits allowed by the receiver of Coffin & Stanton in accordance with an order issued by the United States circuit court of New York, dated May 17, 1895. Under that order, and with the consent of the receiver, the absolute title to these bonds were conveyed to the International Trust Company in consideration of our crediting the bonds in partial payment of the note—$16,000 of the Santa Cruz
178 bonds at sixty, or $9,600. On the other securities pledged with the Santa Cruz bonds, the International Trust Co. gave credit for $17,000 of the town of Greenburg at eighty-five, $14,450, and $20,000 State of Iowa bonds at one hundred and ten, or $22,000, making a total credit of $46,050 on the note of $50,000, which leaves due on the note, after charging interest up to date of giving credit, about $5,000, which balance is still outstanding. The receiver of Coffin & Stanton, with whom we deal, was Thomas C. Wicks, 55 Liberty St., New York.

Cross examination:

The International Trust Co. had no business relations with Coffin & Stanton at that time, but had loaned them from time to time on collateral theretofore. Its relations with Coffin & Stanton were as borrower and lender merely. The $50,000 note which I have mentioned represents money actually advanced at the time. We did not receive a written or printed statement from Coffin & Stanton purporting to show the financial condition of the city of Santa Cruz.

We did not receive a certificate of examination and opinion from an attorney in Santa Cruz. There was a statement made that the legality of the issue had been examined and approved by attorneys for Coffin & Stanton. I did not see the certificate of the opinion myself. These bonds, or any matters connected with them, were not at any time examined by any officer of the International Trust Company.

The substitution of $4,000 Illinois Central bonds for $4,000
179 Santa Cruz bonds was made September 11, 1894. No independent examination was made at that time to ascertain any-

thing concerning the validity of the value of these bonds. We never acted as agent for Coffin & Stanton or in any such capacity, and have no relations with them except that we have loaned them money from time to time on approved collateral.

Redirect:

The general financial standing of Coffin & Stanton at the time of this transaction was high.

Recross:

The words "at 94½ per cent." after the entry "$12,000, city of Santa Cruz, California, 5 per cent. refunding," on the $50,000 note, represents the price at which the Santa Cruz bonds were taken to equal the loan of $50,000 made at the time. Including the credit of $9,600 given on account of the Santa Cruz bonds, the total amount paid up to date on the note is $47,050. We hold no collateral security for the note that has not yet been applied to its payment.

That CHARLES J. CHAPMAN, being called on behalf of the plaintiff and duly sworn, testified as follows:

I am vice-president of the Chapman National Bank of Portland, Maine. The Chapman national bank came into possession of seven $1,000 bonds purporting to be executed by the officers of the city of Santa Cruz, on April 16, 1894, numbered 245, 246, 247, 248, 249, 250, and 251, on or about May 8, 1894. On November 18, 1893, it loaned Coffin & Stanton $5,000 and took as collateral $6,000
180 in bonds of the city of Ironwood, Michigan. During the succeeding winter we asked for additional collateral, the note, which was a four or six months' note, not being due. We had the right under the note to demand additional security, and they sent us a $1,000 bond of the American Debenture Company of Chicago. When the note became due, they asked to renew it. We were unwilling. I saw Mr. Coffin and he stated that he had or would have some bonds of Santa Cruz, which he said were a gilt-edge security, as good as Government bonds, and if we would lend him $5,000 more he would give us as collateral $7,000 Santa Cruz bonds.

I laid the proposition before the directors and they accepted it.

On May 9, 1894, Coffin & Stanton drew on us for $5,000. We paid the draft and they sent us the securities and we took one note dated May 9 for $5,000 at three months, and another dated May 9 for $5,000 at six months. We then had as collateral for both notes the $60,000 city of Ironwood bonds, the $1,000 American Debenture Co. bond, and the $7,000 city of Santa Cruz. The pledge of these seven Santa Cruz bonds represented a fresh advance of $5,000 cash, and a renewal of a previous note of $5,000. The first note of three months became due August 12, and was paid by a renewal for four months more, and we now hold the six months' note of May 9 and the four months' renewal of the other. Coffin & Stanton have never paid directly the amount due on either of those notes. The

Ironwood bond was contested and held invalid by the courts.
181 The American Debenture Co. bond we consider of no account and it has been charged off. The Santa Cruz bonds the bank has reduced to its possession and credited them on account of the bank at par $7,000.

At the time the bank took this pledge of the bonds, it had no knowledge or notice, or supposition whatever, but that Coffin & Stanton were the absolute owners of the bonds. We had no knowledge of any facts which would lead us to suppose that they were other than owners. I was the person who had the conversation with Mr. Coffin, who stated to me that this issue of bonds represented all that the city owed; that they were refunding bonds and took up all the obligations of the city, and further that there were certain water rates and other matters that were pledged for the payment of the interest, and the bonds were absolutely good. I never thought to inquire whether he had paid for the bonds. When we take any bonds we always write at random to merchants and bankers in the place, to investigate. In this instance we wrote to several parties there, and received favorable answers. We did not preserve the records of the matter.

Coffin & Stanton showed me an opinion of an attorney in regard to the validity of the bonds.

Cross-examination:

Five thousand dollars was the only new money advanced when we got the Santa Cruz bonds, but we would have forced the payment of the first note if we had not received the additional margin.
We retained all the collateral securities that we previously
182 held, for the first loan. We made no attempt to realize on the bond of the American Debenture Co., because it was valueless.

After the failure of Coffin & Stanton we credited the Stanta Cruz bonds at par on the notes, $3,500 on each note. This was some time in June, 1896.

We bought the bonds by virtue of the power in the note to purchase the bonds at public or private sale. The board of directors voted to purchase the bonds at par. We did not deal with the receiver. The Chapman national bank had no other business relations with Coffin & Stanton except which I have related. It never acted as agent or correspondent for them.

That JOHN E. BABCOCK, a witness on behalf of plaintiff, being duly sworn, testifies as follows:

I am treasurer of the Wakefield Trust Co., of Wakefield, Rhode Island. The Wakefield Trust Co. has in its possession a $1,000 bond, purporting to be executed by the officers of the city of Santa Cruz, on the sixteenth day of April, 1894. Late in July, 1894, Coffin & Stanton asked for a loan of $10,000 and we loaned them $5,000, with $5,000 New York Suburban Water Co. bonds and $2,000 Illinois Central four per cent. gold bonds, as collateral. This loan was on August 2, 1894, and Coffin & Stanton gave us a prom-

issory note for $5,000, due four months after date, December 2, 1894.

After the last part of August they wrote us asking to send them the Illinois Central Railroad bonds, as they had disposed of them and wanted to substitute, and they sent us $1,000 more of the New
York City Suburban Water Co. bonds, and $1,000 bond of the
183 city of Santa Cruz. We received these two bonds, the New York bond and the Santa Cruz bond, in lieu of the Illinois Central bonds which we surrendered. This was about August 29, 1894; the Santa Cruz bond is number —21.

The Wakefield Trust Co. has agreed with the receiver of Coffin & Stanton to take the bond on account of sixty per cent. of its face value. When we made this loan we had no knowledge or notice of any facts regarding the title of Coffin & Stanton to this bond, except that they said they bought them. They wrote us a letter as follows:

"Coffin & Stanton, bankers, New York, London.

"72 BROADWAY, NEW YORK, *Aug.* 28, 1894.

"Wakefield Trust Co., Wakefield, Mass.

"GENTLEMEN: We have disposed of the $2,000 Illinois Central four per cent. bonds which are held by you as part collateral to our loan, for immediate delivery, and therefore send you tonight, under separate registered cover, $1,000 city of Santa Cruz, Cal., five per cent. bond, and $1,000 New York City Suburban Water Company six per cent. bond. Please send the Illinois Central bonds by return registered mail, we having insured them during transit. We enclose postage for that purpose.

"You are doubtless familiar with the merits of the New York
City Suburban bonds, as you at present hold a number of
184 them as collateral to our loan. We might add that we have made quite a number of sales of these bonds within the past two weeks at prices ranging from one hundred to one hundred two and one-half, and interest.

"We would call your attention to the fact that the city of Santa Cruz is a prosperous city located in the most highly improved portion of the State of California, in the vicinity of San Francisco, being peopled principally by inhabitants from New York and the New England States, who have gone thither in search of a more congenial climate. The city's affairs are well and intelligently conducted, we having been its fiscal agents for many years, and have never known it to default or delay in the payment of interest upon any of its bonds. This issue was purchased by us after a thorough investigation by our Mr. Stanton upon the ground, and after he had become satisfied as to the stability of the city and its future prospects. We consequently have no hesitation in recommending the bonds as an excellent investment.

"Trusting that this substitution will meet with your approval, we remain,

"Yours truly, COFFIN & STANTON.

"T."

Counsel for defendant consent to insertion of a copy of letter.

185 They also sent us a circular which was as follows:

"Coffin & Stanton, bankers, New York, London.

"We offer subject to sale, or advance in price,

"$300,000

"City of Santa Cruz, California, five per cent. refunding gold, dated April 16, 1894, due as follows:

"$9,000 April 15, 1895, and $9,000 annually thereafter.

"Average time to run, 20½ years.

"No option of redemption before maturity.

"Denomination, $1,000.

"Coupons — annually April 15th.

"Payable at city treasurer's office, Santa Cruz.

"Real valuation		$9,768,600
"Assessed valuation		3,907,400
"Total debt (this issue)	$360,000	
"Issued to refund bonds for water supply	320,000	
"Net debt		40,000

"Including the suburbs, a total population of 11,000 is tributary to the water system. The corporate limits of the city have not been enlarged for many years.

"The water plant is a gravity system, costing about $370,000.

"A legal investment for savings banks in the State of Rhode Island, Pennsylvania, Maryland and New Hampshire. Price, 101 and interest. Nets nearly 5 per cent.

186 "Under the law governing savings banks' investments in the State of Massachusetts, the debt issued for water supply is deducted from the gross debt on the theory that such property is self-sustaining, and no burden upon the city. In estimating the debt indebtedness this rule has been followed."

That letter and circular are all the evidence of the ownership of the bonds and of the financial condition of the defendant that the Wakefield Trust Company had at the time it accepted bond No. 21 in place of Illinois Central bonds.

Cross-examination:

I do not recall being shown a certificate from an attorney named Goldsby. As to the other securities that we held, we have accepted new bonds of the New York City Suburban Water Co. in place of the old ones. That company has been reorganized. We did not take a new note. The new bonds bore interest at the rate of two and one-half per cent. We took them at sixty-five. We acted wholly on the advice received from the receiver of Coffin & Stanton, and in connection with the advisory board of the creditors of Coffin & Stanton.

The Santa Cruz and New York City Suburban Water Co. bonds are the only collateral security we hold for that loan. Neither the Wakefield Trust Company nor myself had any business relations with Coffin & Stanton prior to this loan. Coffin & Stanton represented nothing further than the letter I have produced and the circular.

The Illinois Central bonds surrendered were two bonds of the par value of $1,000 each and the par value of the bonds re-
187 ceived in their place was $2,000. The Illinois Central at that time were quoted at ninety-eight to one hundred.

Redirect:

The advisory board of Coffin & Stanton was a committee appointed to represent the creditors generally in negotiation of affairs with the receiver.

That ALBERT STONE, a witness on behalf of plaintiff, being duly sworn, testified as follows:

I am vice-president of the National Bank of the Republic of Boston, Mass. The National Bank of the Republic took some bonds purporting to be signed by the city of Santa Cruz on April 16, 1894, as collateral for a loan to Coffin & Stanton, of $50,000. Their note is dated June 7th. The bank took as collateral $20,000 Kings county, New York, school district No. 6 bonds, $10,000 five per cent. city of Santa Cruz, and $25,000 Illinois Central Railroad Co. four per cent. bonds.

I acted on behalf of the National Bank of the Republic in that transaction, and made the loan through Moseley & Co., brokers, of this city. I did not personally know Coffin & Stanton, or either of them. They stood in the community with the highest credit, both for capital and integrity, and in every way rated at the highest rating in all the agencies, a million and over, and the highest credit.

At the time of the execution of that note, the National Bank of the Republic advanced to Coffin & Stanton the sum of $50,000 less the interest. It was a fresh advance at that time, not a renewal, nor to represent any antecedent debt. At that time neither
188 the officers of the National Bank of the Republic, so far as I know, nor myself, had any notice or knowledge regarding Coffin & Stanton's title to these Santa Cruz bonds. We did not know Coffin & Stanton in the transaction at all, but acted entirely with Moseley. We had no notice or knowledge of the financial condition of the city of Santa Cruz; it was simply represented to me by the broker as a first-class municipal bond. I do not know whether they submitted to me any written or printed statements as to the financial condition of city. They did not submit to us any opinion in regard to the validity of the bonds. When the note was delivered to us the bonds were delivered at the same time. The bonds pledged to the National Bank of the Republic to secure that loan were numbered 109 to 117 inclusive, and 72. The National Bank of the Republic has sold those bonds under the pledge to make a title.

Cross-examination:

So far as I know, our bank had no previous dealing with Coffin & Stanton. I personally had none. We put no value on these bonds in taking them as collateral. We took the face value of $55,000 as against the loan of $50,000. The loan was at four per cent. We actually advanced to Coffin & Stanton at that time $49,333.33, which is $50,000 less four months' interest.

That SUMNER WALLACE, a witness on behalf of plaintiff, being duly sworn, testifies as follows:

I am a member of E. G. & E. Wallace, tanning and shoe manufacturers, of Rochester, N. H. I represented that firm in the
189 purchase of certain bonds purporting to be executed by the officers of the defendant on April 16, 1894.

I then represented in the firm the interest of my father, E. G. Wallace, who was dead. In August, 1894, the firm owned a block of the stock of the Page Belting Company, at Concord, N. H. We were at loggerheads with the management of that company, and wanted to sell our stock. We decided to sell it through a broker in Boston, and to offer it through F. H. Prince & Co., brokers, of Boston. I called on F. H. Prince and asked him if he could dispose of the stock. He said he thought he could. In about a week I called again; he said he could sell the stock at eighty-five per cent. of the par value if we would take bonds at par and interest. He made us a proposition in writing as follows:

"F. H. Prince & Co., bankers and brokers, 2 and 8 State St.

"BOSTON, *Sept.* 22, 1894.

"Messrs. Coffin & Stanton, New York, N. Y.

"GENTLEMEN: We have arranged a trade for you with Messrs. E. & E. G. Wallace, as follows:

"We have sold $150,000 city of Santa Cruz, Cal., bonds at par, you to deliver the bonds at the earliest date of maturity which you hold, on Tuesday next, and $150,000 city of Irinwood, Mich., six per cent. bonds at one hundred and five, and interest, you agreeing that the legality of the city of Ironwood bonds shall be satisfactory
to Judge Dillon and a legal opinion obtained from him to
190 that effect, and if not from him, from such lawyer as may be agreeable to us. You are to take in part payment of the above bonds 520 shares of common and 350 shares of preferred stock of the Page Belting Company, at eighty-five per cent. of its par value, as follows: Half on the delivery of $150,000 city of Santa Cruz bonds, and the other half on the delivery of the $150,000 city of Ironwood bonds—you to deposit with us $10,000 city of Waco, Tex., first-mortgage water Co. six per cent. bonds and the 435 shares of Page Belting Co. stock received by you on delivery of the $150,000 city of Santa Cruz bonds, as surety that you will perform in full the above agreement in delivering the $150,000 of city of Ironwood bonds on the condition above named, and receive the remaining one-half of the Page Belting Co. stock, that is 435 shares as part payment

thereof. The balance of purchase-money for each lot of bonds is to be paid in cash on the delivery of bonds.

"Please confirm the trade by signing the inclosed letter and return the same to us forthwith.

"Very truly yours, F. H. PRINCE & CO."

Counsel for defendant consents to copy of letter being inserted. That letter addressed to Coffin & Stanton contains the substance of the proposition submitted to E. G. & E. Wallace and was accepted by that firm. Before accepting the proposition, we looked into the matter very carefully and used all the care we could to find out about the value of the bond- and the validity of their issue. We received $150,000 of the city of Santa Cruz five per cent. bonds
191 at par and interest and delivered 175 shares of the preferred stock and 260 of the common stock of the Page Belting Co. on account of the Santa Cruz bonds, and the balance covering Prince's commission of $2,500 for selling the stock, or $118,000, was paid in cash.

The bonds we received were refunding bonds of the defendant, which form the subject-matter of this action. The stock of the Page Belting Co. was delivered to Prince & Co. for the account of Coffin & Stanton and the money was paid for their account. The stock of the Page Belting Co. we have never received back. The proposition for a further sale of other shares of the Page Belting Co. and the purchase by us of the city of Ironwood, Mich., bonds was never carried out.

Eight of the bonds, numbered 1 to 9, inclusive, belonged to us; those bonds were also assigned to Mr. Waite, and so far as I know, are still in his possession. No other person representing the firm of E. G. & E. Wallace made any investigation in regard to these bonds. I made no investigation regarding the financial condition of the city of Santa Cruz prior to purchasing these bonds. I think F. H. Prince & Co. made no statement to me in regard to the financial condition of the city, or in regard to the validity of the bonds. They submitted the opinion of Mr. Goldsby, of Santa Cruz, Cal., and Mr. Gleason, of New York. This was not satisfactory to us, and we asked for the opinion of some attorney in Boston, and decided to refer it to Mr. M. F. Dickinson, Jr., attorney for the American Loan & Trust Co., and his opinion was obtained, which I have here.
Those opinions being favorable, I purchased the bonds. I
192 have the opinions of the attorneys upon which we relied in making the purchase. The opinion of Mr. Goldsby was as follows:

Z. N. Goldsby, attorney-at-law.

SANTA CRUZ, CAL., *April* 25, 1894.

I hereby certify that I have carefully examined all the steps taken and proceedings had relative to the issuance of $300,000 in five per cent. refunding bonds by the city of Santa Cruz, in the State of California, and the bonds issued pursuant thereto, dated April 16, 1894, and find said proceeding regular and said bonds

legally issued and a valid and binding obligation of said city of Santa Cruz.

Z. N. GOLDSBY,
Attorney-at-law.

The opinion of Mr. Gleason was as follows:

44 WALL STREET, NEW YORK, *Aug.* 16, 1894.

Messrs. Coffin & Stanton, 72 Broadway, N. Y. city.

GENTLEMEN: I return you herewith certified copies of the proceedings of the officials of the city of Santa Cruz, Cal., with reference to the issuance of the refunding bonds of said city, bearing date April 16, 1894.

I have made a careful examination of these papers and of the constitution and statutes of the State of California with reference to the issuance of refunding bonds by cities of said State.

All the provisions of the constitution and the statutes of
193 the State seem to have been most carefully and fully complied with, and from my examination I am of the opinion that these bonds are issued in pursuance of the laws relating thereto and are legal and valid obligations of the said city of Santa Cruz.

Yours truly, LAFAYETTE B. GLEASON.

The opinion of Mr. Dickinson was as follows:

BOSTON, *August* 29, 1894.

F. H. Prince & Co., 2 and 8 State St., Boston, Mass.

GENTLEMEN: I have examined the papers that you have submitted in regard to the $360,000 five per cent. refunding bonds of the city of Santa Cruz, Cal., dated April 16, 1894. In my opinion the bonds are legally issued in conformity to the laws of the State of California, and the ordinances of the city of Santa Cruz, and constitute a legal and valid obligation of said city.

Very respectfully, yours, M. F. DICKINSON, JR.

Counsel for defendant consents that copies of the three (3) foregoing opinions be inserted.

I made an inquiry as to the value of these bonds as a financial proposition from E. H. Rollins & Son, bankers & bond dealers, of Boston. They said the bonds were worth par easily, and a little more. I made no further investigation in regard to value nor in regard to validity other than the three opinions I have presented.

194 Cross-examination:

My uncle, Edwin Wallace, who is dead, came down at the time the deal was closed and assisted. He made no investigation as to the bonds. He left it all for me. We made the first proposition to Mr. Prince, or had the first talk with him, some time in August. We closed up September 22d, and between those dates we got the three opinions and had the talk with Mr. Rollins about the value of the bonds. I never saw Mr. Dickinson. Mr. Prince brought his

opinion to us. All these opinions were procured by Prince & Co. or by Coffin & Stanton. The Goldsby and Gleason opinions were submitted to us without consultation with us, but the Dickinson opinion was obtained after by agreement, after I had said to Prince & Co. that I wanted an opinion from Dickinson.

The Goldsby and Gleason opinions were submitted some time between the middle of August and September 22. Neither the firms of E. G. & E. Wallace nor myself had any prior business relations with Coffin & Stanton. I had had some little dealing with Mr. Prince with reference to the New York and New England Railroad reorganization scheme. That was the only dealing I have had with him and had nothing to do with the purchase or sale of bonds. I had had no other business or social or commercial relations with Prince & Co. None of the members of my firm had. They did not know Mr. Prince even by sight until after this deal was commenced. I will not say whether or not there was a prior communication from Prince & Co. to us with reference to this transaction.

195 I first heard in October, 1894, that Coffin & Stanton were in failing circumstances. We took the Santa Cruz bonds at par and interest.

That ALBERT H. WAITE, a witness on behalf of plaintiff, being first duly sworn, testifies as follows:

I am the plaintiff in this action, and president of the First National Bank of Worcester, Mass. The First National Bank of Worcester acquired possession of twenty-two bonds purporting to be executed by the officers of the defendant on April 16, 1894, being bonds numbered 9, 13, 23, 100, 300, 301, 302, 303, 308, 309, 310, 311, 312, 325, 326, 327, 238, 343, 348, 349, 350, and 351. It acquired these bonds on the twentieth day of July, 1894, on account of a loan of $25,000 made at that time to Coffin & Stanton and represented by a promissory note of Coffin & Stanton. $12,000 Illinois Central 4's, $18,000 city of Santa Cruz 5's were placed as collateral security for the payment of that note. About August 28, they withdrew $2,000 Illinois Central 4's, substituting $2,000 Santa Cruz 5's. Again September 11, 1894, $2,000 Illinois Central were withdrawn and $2,000 Santa Cruz substituted. October 21, 1894, the remaining Illinois Central $8,000 were withdrawn and sold at their request, and they made a payment on the note of $6,400, which we credited.

I represented the bank in this transaction and dealt with a representative of Coffin & Stanton named Terrell. Coffin & Stanton have never paid the balance due on that note. The First National Bank of Worcester had these bonds advertised and sold at auction in New York city. I purchased the bonds and paid for them at 60 per cent. of their face.

196 At the time of this loan to Coffin & Stanton the First national bank had no knowledge or notice of what the title of Coffin & Stanton was to these bonds, nor of any facts which might lead it to know or understand that they were not the owners of those bonds. The bank made no investigation of the financial condition of the defendant, prior to the making of this loan. Mr. Ter-

rell made substantially the same representations as were embodied in a circular which they sent out, showing the population and resources of the city. He delivered to me the circular, which was as follows (the circular in question is the same as the circular hereinbefore printed at page 72, line 21 hereof).

That circular gave all the information that the First National Bank of Worcester had in regard to the financial condition of the city of Santa Cruz. It had no statement or opinion in regard to the validity of the issue. Mr. Terrell made satisfactory representations in regard to that.

The balance still due the First National Bank of Worcester after the payment made by Coffin & Stanton, and after the credit of 60 per cent. derived from the sale of the bonds, is $5,400 and interest on the balance. That is $5,400 of the principal remains unpaid, but no interest has been paid since the maturity of the note. The note is dated July 19, 1894, payable four months after date.

The National Bank of the Republic has turned its pledge into a title by selling its bonds at auction. I bought them, paying 40 per cent.

197 Cross-examination:

The sale was made in Boston by R. L. Day & Co., and was a pledgee's sale simply. I do not claim to have any better title to those bonds than the title held by the National Bank of the Republic. As to all the bonds and coupons sued on by me, I am merely a trustee for collection.

All the collateral security for the $25,000 note has been either released or sold to satisfy the note. The 22 Santa Cruz refunding bonds were sold at a pledgee's sale for 60 per cent. of their par value. Neither the First National Bank of Worcester nor myself had any business relations with Coffin & Stanton prior to the execution of the note, of which I have spoken, nor was the bank nor myself ever an agent or correspondent of Coffin & Stanton. This loan was the only transaction that either the bank or myself ever had with them.

I do not remember that Mr. Terrell produced any written certificates or opinions regarding the validity of the bonds. Coffin & Stanton wrote us the following letter:

72 Broadway, New York, *July* 14, 1894.

First national bank, Worcester, Mass.

Gentlemen: We are advised by our representative, Mr. Park Terrell, that you would probably be in a position to entertain an application for a loan of $25,000, to run four months at the rate of 5 per cent. per annum.

We have two loans maturing during the coming week, which will enable us to pledge with you as collateral security for the
198 loan above described $12,000 Illinois Central gold 4 per cent. bonds, at 98½, and $16,000 city of Santa Cruz, Cal., gold refunding 5's, at 101; or, if you prefer, we can give you $18,000 New

York City Suburban Water Co. 6 per cent. bonds in place of city of Santa Cruz, Cal., 5's.

You are doubtless familiar with the Illinois Central 4's. Those offered you are due in 1953, being quoted upon the New York stock exchange, last sales having been made at about the price above quoted.

We inclose circular describing the Santa Cruz bonds. This is a prosperous city, located in the most highly improved portion of the State of California, in the vicinity of San Francisco, and is peopled largely by inhabitants from New York and the New England States, who have gone thither in search of a more congenial climate. The city's affairs are well and intelligently managed, we having been its fiscal agents for many years, and never known it to default in the interest upon any of its bonds, with never a suggestion of delay at any time. These bonds were purchased by us after a thorough investigation made by our Mr. Stanton upon the ground, whose experience in the purchase of municipal securities is quite large. We consequently have no hesitation in recommending them as excellent investment. The plant of the New York City Suburban Water Co. is located at Mount Vernon, N. Y., supplying that city and adjacent municipalities, all immediately contiguous to the corporation line of New York city, with water. This territory will, doubtless, be annexed to New York city within the near future, which will greatly enhance the value of the water company's property. Besides,
199 we are advised that it will involve the acquirement of this plant by the city, thus constituting these bonds a New York obligation. The bonds are quoted in the present market at 102 and interest, recent sales having been made at that figure.

Trusting that either of the foregoing propositions may commend themselves to your judgment, we remain,

Yours very truly, COFFIN & STANTON.

"T."

(Enclosure.)

Counsel for plaintiff consents to a copy of letter being inserted.

That FRANK W. MISH, a witness on behalf of the plaintiff, being duly sworn, testifies as follows:

I am attorney for and director of the First National Bank of Hagerstown, Maryland. On July 18, 1894, the bank came in possession of bonds purporting to be executed by the officers of the defendant, on April 16, 1894. We had been doing business with Coffin & Stanton; in July, 1894, we wrote them asking them to propose a loan to the bank, and on July 13, 1894, they wrote us the following letter:

"72 BROADWAY, NEW YORK, *July* 13, 1894.

First national bank, Hagerstown, Md.

GENTLEMEN: We are in receipt of your favor of the tenth inst., suggesting that we might make a proposition to you for a loan for consideration at your board meeting to be held on the seven-
200 teenth inst. We beg to propose a loan of $5,000, for three months, 5 per cent., giving you as security $6,000 city of

Santa Cruz, Cal., 5 per cent., refunding gold bonds. We enclose you herewith a circular describing this issue, which gives the data. We might add that we have been the fiscal agents of this city for some years, and that in making remittances for their interest and principal they always have the funds in New York some days before they are due.

The city of Santa Cruz is one of the most beautiful spots in the State of California. The writer has visited the city several times, and would state that it has not only a fairly good mercantile business, and substantial agricultural interests, but probably entertains more guests every year than any other watering place in the State of California. The permanent residents of Santa Cruz are mostly eastern people, and the houses are substantially constructed. We have no doubt as to all interest and principal being promptly paid at maturity. If you desire we can furnish you with attorney's opinion establishing the legality of the issue, and will also be pleased to furnish you with any further particulars which you may desire. If your board considers our proposition favorably, we would be glad to have you telegraph us to that effect of the date the board indicated.

Yours truly, COFFIN & STANTON."

I have not the circular inclosed with the letter, but remember it set forth the advantages of Santa Cruz, and made a very satisfactory showing as to the financial condition of the defendant.

201 We made a loan to Coffin & Stanton of $5,000, with six $1,000 Santa Cruz bonds as collateral on July 19, 1894. The loan was represented by a promissory note in the words and figures following:

No. —. Due Oct. 16–19, '94.

$5,000. NEW YORK, *July* 18, 1894.

Ninety days after date, and upon return of security given, we promise to pay to First national bank, Hagerstown, Md., or order five thousand dollars for value received, having deposited herewith as collateral security $6,000 Santa —, Cal., 5 per cent. refunding bonds, with authority to sell the same, or other security subsequently substituted, at the board of brokers, or at public or private sale, at their option, on the non-performance of this promise; applying the net proceeds to the payment of this note, including interest and accounting to us for the surplus, if any. In case of deficiency we promise to pay to the holder of this note the amount of such deficiency, forthwith after such sale, with legal interest.

COFFIN & STANTON.

(Endorsed:) Pay E. Scofield, cashier, or order, for collection for account of First national bank, Hagerstown, Md. John D. Newcomer, cashier.

At the time of the delivery of this note the First national bank actually loaned that amount of money to Coffin & Stanton, less

discount at the rate of 6 per cent. per annum, for ninety days. The First National Bank of Hagerstown still holds those bonds in the same manner that it held them then, with the exception of
202 the coupon first maturing on each of the bonds which has been assigned to Mr. Waite, the plaintiff herein, for collection. The First national bank at the time of making this loan had no knowledge or notice of any facts relative to the title of Coffin & Stanton to those bonds, other than the statement contained in that letter and the possession of the bonds. Nor did it have any knowledge or notice of any facts concerning the financial condition of the city of Santa Cruz, other than statements made by Coffin & Stanton in the circular, except that we looked up the matter so far as population was concerned, but nothing more. We had no knowledge of the indebtedness of the city other than what was stated by Coffin & Stanton. We had had business with Coffin & Stanton before. We had held notes of theirs, prior to July 10, 1894. I was not personally acquainted with any of the members of the firm of Coffin & Stanton until July 18, 1894. None of the officers of the bank were. The money was not paid to Coffin & Stanton at Hagerstown; it was paid through the First National Bank of New York.

I do not remember distinctly the contents of the circular referred to in this letter. I think it stated the indebtedness of the city of Santa Cruz, and that the bonds were issued to refund a certain indebtedness of the city. I am not sure whether we got an attorney's opinion regarding the validity of the issue. We often do get the attorney's opinion. It is a rule to get the opinions, if possible, at the bank. I do not remember whether we requested any further particulars. Coffin & Stanton paid us nothing on the note of July 18, 1894.

203 That JONAS H. BROOKES, a witness on behalf of the plaintiff, being duly sworn, testifies as follows:

I am cashier of the Albany City national bank, at Albany, New York. That bank came into possession of bonds of the defendant purporting to be executed by its officers on the sixteenth day of April, 1894. Bonds numbers 253 and 244, series 26. Bonds numbers 235 to 243, both inclusive, of series 27. Bonds numbers 280 to 288, both inclusive, of series 32.

Our bank made two loans to Coffin & Stanton on July 25, 1894, taking among other collaterals these bonds as security. Two notes were given, one by Coffin & Stanton, direct to the bank, and one by Charles B. Ludwig, and guaranteed by Coffin & Stanton. The notes are in the words and figures following:

No. —. Due —.

$25,000. NEW YORK, *July* 25, 1894.

Five days after demand, without grace, after date, and upon return of security given, we promise to pay to Albany City national bank or order twenty-five thousand dollars for value received, with interest at five per cent. per annum, having deposited herewith as collateral security $15,000 New York City Suburban Water Co. 1st

6 per cent.; $11,000 City of Santa Cruz, Cal., refunding 5 per cent.; $7,000 New Utrecht, New Yo;k, 5 per cent. St. Imp. 5 per cent. bonds, with authority to sell the same, or other security subsquently substituted at the board of brokers, or at public or private sale at their option, on the non-performance of this promise; applying the net proceeds to the payment of this note, including interest
204 and accounting to us for the surplus, if any. In case of deficiency, we promise to pay to the holder of this note the amount of such deficiency, forthwith after such sale, with legal interest.

COFFIN & STANTON.

No. —. Due —.

$25,000. JULY 25, 1894.

Five days after demand without grace after date, and upon return of security given, we promise to pay to Albany City national bank, or order, twenty-five thousand dollars for value received, with interest at five per cent. per annum, having deposited herewith as collateral security: $11,000 New York City Suburban Q. Co. 1st 6 per cent.; $9,000 City of Santa Cruz, Cal., refunding, 5 per cent.; $12,000 New Utrecht, New York, 5 per cent. St. Imp. bonds, with authority to sell the same, or other security, subsequently substituted, at the board of brokers, or at public or private sale at their option, on the non-performance of this promise; applying the net proceeds to the payment of this note, including interest and accounting to us for the surplus, if any. In case of deficiency we promise to pay to the holder of this note the amount of such deficiency, forthwith after such sale, with legal interest.

CHAS. B. LUDWIG.

(Endorsed:) We guarantee payment of within note. Coffin & Stanton.

Counsel for defendant consents that copies of said notes be inserted.

205 At the time these notes were executed and delivered to the bank, $50,000 was advanced on account thereof, no interest was discounted at the time. We held a note dated February 12, 1894, for $25,000 signed by Coffin & Stanton, upon which they paid on July 3d $7,000, and on July 7th $5,000, leaving a balance of $13,000 due. We held at the same time another note dated March 16, 1894, for $25,000 made by C. B. Ludwig, and guaranteed by Coffin & Stanton, on which there had been paid on July 13th $7,000.

At the time of the execution of these two notes of July 25, 1894, the bank advanced Coffin & Stanton $19,000 of fresh money and a renewal of the two notes upon which there was a balance of $31,000 due. On the note made by Coffin & Stanton for $25,000 we held $15,000 New York City Suburban Water Company bonds, first-mortgage bonds, $11,000 city of Santa Cruz refunding bonds, and $7,000 New Utrecht street-improvement bonds. The $15,000 Sub-

urban Water bonds we bought in by an agreement with the receiver of Coffin & Stanton at sixty cents on the dollar; the seven New Utrecht bonds we sold to a broker in New York, with the consent of the receiver of Coffin & Stanton, at 101 or 103, and the proceeds were applied on the note.

On the note made by Charles B. Ludwig of July 25, 1894, we held $11,000 New York City Suburban Water Company bonds, $9,000 city of Santa Cruz refunding bonds, and $12,000 New Utrecht street-improvement bonds. The New York City Suburban Water Company bonds were bought in the same manner as the others, at sixty cents on the dollar, and the proceeds applied on the
206 notes. The $13,000 New Utrecht bonds were sold like the others at 101 or 103, and the proceeds applied on the note. The Santa Cruz bonds were sold through Muller & Son, at New York, on September 16, 1896, at public auction; they brought sixty cents on the dollar, and the proceeds have been credited on the notes.

The Mr. Ludwig who made that note was a clerk in the employ of Coffin & Stanton. When we made this new loan, represented by the two promissory notes of July 25, 1894, that was the first time we had taken the Santa Cruz refunding bonds. We had the other securities described in those notes to secure the previous notes.

At the time we took these Santa Cruz refunding bonds Coffin & Stanton stated to me orally in their office, that they bought the bonds direct from the city. That is all that the bank knew in regard to their title before we made this loan. Regarding the financial condition of the defendant, we knew nothing, other than the statement which Coffin & Stanton published as to the condition of the city. We received this before we made the loan. The statement referred to is the same statement hereinbefore set out at page 72, line 21 hereof.

They also made an oral statement to me regarding the financial condition of the city.

Cross-examination:

On the note of Coffin & Stanton, dated February 13, 1894, of $25,000, we held $10,000 Illinois Central bonds and $10,000 New Utrecht bonds, and $10,000 New York City Suburban Water Company bonds, originally, and I think upon the payment of $12,000 on July 3d and July 17th, we had surrendered the $10,000
207 Illinois Central bonds, and a part of the New Utrecht bonds.

On the other note of March 6, 1894, made by Ludwig, and guaranteed by Coffin & Stanton, we originally held $20,000 New Utrecht bonds and $15,000 New York City Suburban Water Company. There had been paid on that loan on July 13, $7,000, and we had surrendered a part of the New Utrecht bonds on this payment. I was in New York on July 25, 1894, and visited Coffin & Stanton. They then owed $31,000 and proposed to put up $20,000 Santa Cruz bonds, to be divided between the two loans in proportion, to secure the separate loans, to correspond with the two loans. The net result of it was that we advanced $1,900 of money on $20,000

Santa Cruz bonds, and those other bonds were already in Albany in our possession. They drew on us at sight for $19,000, with the $20,000 bonds attached, and sent them to Albany and the draft was paid the next day.

I did not at that time know that Coffin & Stanton were the fiscal agents of the city of Santa Cruz. I saw the circular that they issued before I made the loan.

Mr. Stanton had told me that they purchased the bonds outright. The bonds were sold by us September 16, 1896; Albert H. Waite, the plaintiff in this action, bought them at public sale. I received Mr. Waite's note for the proceeds of the sale.

That WILLIAM J. NEVIUS, a witness on behalf of plaintiff, being duly sworn, testifies as follows:

I am loan clerk in the first National Bank of New York. On July 18, 1894, the First National Bank of New York paid to Coffin & Stanton $4,921.61 for the account of the First National
208 Bank of Hagerstown, Md. I took in return for that money, the note of Coffin & Stanton for $5,000 for the account of the First National Bank of Hagerstown. I took at the same time from Coffin & Stanton six bonds of the city of Santa Cruz, described therein as the collateral security for such note. Those bonds are numbers 83, 84, 85, 86, 87, of $1,000 each, due in 1904, and number 299, of $1,000, due in 1928.

That JOHN H. FERRIS, a witness on behalf of plaintiff, being first duly sworn, testifies as follows:

I am vice-president of the South Norwalk Savings Bank of South Norwalk. On July 26, 1894, the South Norwalk savings bank came into possession of eleven bonds purporting to be executed by the officers of the defendant, on the sixteenth day of April, 1894, numbers 25, 26, 95, 97, 98, 99, 154, 155, 158, 305, and 306. On behalf of the bank, I made a loan to Coffin & Stanton, New York, of $10,000, receiving a note in the words and figures following:

No. —. Due ——.

$10,000. NEW YORK, *June* 30, 1894.

On demand, after date, and upon return of security given, we promise to pay to South Norwalk savings bank, Conn., or order, ten thousand dollars, for value received, with interest at six per cent. per annum, having deposited herewith as collateral security: $11,000 city of Santa Cruz, Cal., 5's, with authority to sell the same, or other security subsequently substituted, at the board of brokers, or at public or private sale, at their option, on the non-performance of this
209 promise; applying the net proceeds to the payment of this note, including interest, and accounting to us for the surplus, if any. In case of deficiency, we promise to pay to the holder of this note the amount of such deficiency forthwith after such sale, with legal interest.

COFFIN & STANTON.

We received as collateral security for this note, these eleven bonds. I dealt with Mr. Coffin. They showed me the attorney's opinion of the bonds at the time. I looked the matter up with them at their office, and I was satisfied from what information they gave me and the circular they showed me at the time, that it was a good collateral loan.

I knew nothing of their ownership of the bonds. They did not make any statement to me as how they came into possession of them. I did not see the bonds in their possession at any time. They were sent to South Norwalk the next day after I made the loan, with draft attached and also the promissory note. I made no investigation in regard to the financial condition of the city of Santa Cruz other than that which I made during the conversation with Coffin & Stanton. The circular hereinbefore set out at page 72, line 21, hereof, is similar to the circular they showed me. The bank still holds those bonds and has taken no steps to convert its pledge into a title, or to dispose of its security. Coffin & Stanton have not paid the promissory note referred to.

Cross-examinntion:

When I made this loan I received no other collateral security besides the eleven Santa Cruz bonds. We held two notes of Coffin & Stanton, made prior to this loan, one in April and one in February. Those notes are still due.

We have been dealing with Coffin & Stanton for ten or
210 twelve years. We have presented a claim to the receiver, of this loan of $10,000, no dividends having been paid. The opinion of a New York lawyer was given as to the legality of the Santa Cruz bonds. I did not request the opinion of a Santa Cruz or California lawyer. Mr. Coffin gave me an account of his trip to California. I knew that Coffin & Stanton did a large business in municipal bonds at the time, but I did not know that they were the fiscal agents for quite a number of towns. I did not know, nor did they ever inform me, that they were the fiscal agents of the city of Santa Cruz; on the contrary, I think that they told me that they absolutely bought the bonds. Mr. Coffin told me that.

That BENJAMIN F. PETHERAM, a witness on behalf of plaintiff, being first duly sworn, testifies as follows:

I am cashier of the Bank of Skaneateles of Skaneateles, New York. The bank made a loan to Coffin & Stanton on their note of $10,000 about the sixth or seventh of June, 1894, and five bonds purporting to be executed by the officers of the defendant on the sixteenth day of April, 1894, being numbers 102, 103, 104, 105, and 106, were given to us as collateral security for that note and forwarded, with draft attached, through the bank of the Manhattan Company of New York to us by express. The note was in the words and figures following:

No. —. Due —.

$10,000. NEW YORK, *June* 6, 1894.

On demand (fifteen days' call), after date, and upon return
211 of security given, we promise to pay to Bank of Skaneateles, Skaneateles, or order, $10,000, for value received, with interest at five per cent. per annum, having deposited herewith as collateral security:

$7,000 City of Santa Cruz., Cal., 5's,
$5,000 Illinois Central 4's,

with authority to sell the same, or other security subsequently substituted, at the board of brokers, or at public or private sale, at their option, on the non-performance of this promise; applying the net proceeds to the payment of this note, including interest and accounting to us for the surplus, if any. In case of deficiency we promise to pay to the holder of this note the amount of such deficiency forthwith after such sale, with legal interest.

COFFIN & STANTON.

(Endorsed.)

P'd on within note Nov., '87–'94	$4,991.25
" " " " Oct. 7 by acceptance of Santa Cruz bonds	3,000
" " N. Y. Sub. Water Co.	1,300

The seven bonds of the city of Santa Cruz, in regard to which I have testified, together with five 4 per cent. Illinois Central bonds, were given to the bank as collateral security at the time this note was executed. Coffin & Stanton drew on us for the amount described in this note, $10,000, and we paid the draft. We had had other transactions with Coffin & Stanton, but this note was not a renewal of any previous obligation of theirs; it represented
212 a fresh advance of $10,000. The transaction was entirely by mail. We had a letter from them that they owned the bonds. The letter was as follows:

Coffin & Stanton, bankers, New York, London.

72 BROADWAY, NEW YORK, *June* 1, 1894.

Bank of Skaneateles, Skaneateles, N. Y.

GENTLEMEN: We have yours of the 31st ult., and in accordance therewith, we beg to submit you a proposition for a loan of $10,000, to run, three, four, or six months, or at fifteen days' call, at the rate of 5 per cent., and offer you as collateral security thereto:

$6,000 Illinois Central gold 4 per cents, due 1953, at 98, and
$7,000 American Debenture Collateral Trust gold 5's, at 93,

or

$5,000 Illinois Central gold 4 per cents, due 1953, at 98, and
$7,000 City of Santa Cruz, Cal., gold, refunding, 5 per cents, at 101.

You are doubtless familiar with the Illinois Central 4's and the

American Debenture Collateral Trust 5's, both of which are quoted upon the New York stock exchange, the last sales for them having been made at about the figures above quoted. We enclose you marked clipping of a New York paper showing quotation for the above.

We hand you herewith a circular describing the Santa
213 Cruz bonds. This is a prosperous city, located in the vicinity of San Francisco. It is situated in a highly improved portion of the State of California, and is one of its thriving cities. These bonds were purchased by us after a thorough investigation made by our Mr. Stanton upon the ground, and we have no hesitation in recommending them to you as an excellent security.

If there is any further information you may desire concerning any of the above bonds, we shall be pleased to furnish the same to you.

Trusting that you may favorably consider either one of the foregoing propositions, we remain,

Yours very truly, COFFIN & STANTON.

(Inclosure.)

I have no recollection of any other circular being received with that letter. Regarding the financial condition of the city of Santa Cruz, I wrote to a banker in Santa Cruz, and simply got a little printed pamphlet in response. The promissory note for which these bonds were given as collateral has not been paid. We have realized $4,991.25 on the Illinois Central 4 per cent. bonds which we had. We originally had $7,000 of Santa Cruz bonds. Coffin & Stanton substituted $2,000 of New York City Suburban Water Company bonds for two of them, and in accordance with the decree of the court, we took the New York City Suburban Water Company bonds at 65 and the Santa Cruz $5,000 bonds at 60, and indorsed them at sixty cents on the dollar on the note, in accordance with the agreement with the receiver of Coffin & Stanton. We credited these amounts on the note.

214 Cross-examination:

At that time we held no other notes of Coffin & Stanton. They owned us nothing at the time we made this loan of $10,000; none of the officers of our bank knew Coffin & Stanton personally. We have known them from reputation for eight of ten years. We did not get the opinion of any attorney as to the validity of these bonds. We relied solely upon Coffin & Stanton's statement. I did not know that they, at the time of this negotiation, were the fiscal agents of the city of Santa Cruz. They drew two drafts on us for this $10,000, and we paid them. We had never before held any bonds of the city of Santa Cruz of this issue. We had had other bonds of the city before this.

That JOHN B. DAVIS, a witness on behalf of plaintiff, being first duly sworn, testifies as follows:

I am cashier of the Farmers' national bank, at Mt. Holly, New Jersey. The Farmers' National Bank, of New Jersey, came into possession of bonds Nos. 96, 156, 276, and 313, purporting to be executed by the officers of the defendant on the sixteenth day of April, 1894. We made a loan to Coffin & Stanton of $10,000, on January 30, 1894, taking a secured note, and when that note matured, they offered us another note in exchange for it, dated June 2, 1894, as renewal for that note, and gave us $1,000 Santa Cruz bond, with other collateral, and on June 3, 1894, they substituted a $1,000 Santa Cruz bond for a portion of the collateral, and on June 23, 1894, they substituted $2,000 Santa Cruz bonds for other collateral.

215 The note given by Coffin & Stanton to the bank is in the words and figures following:

No. —. Due Oct. 2–5, '94.

$10,000. NEW YORK, *June* 2, 1894.

Four months after date, and upon return of security given, we promise to pay to Farmers' national bank, Mt. Holly, N. J., or order, ten thousand dollars, for value received, having deposited herewith as collateral security:

3,000 Illinois Cent. 4's,
2,000 City of Harriman, 6's,
8,000 American Deb. 5's,
1,000 Santa Cruz, Cal., 5's,

with authority to sell the same, or other security subsequently substituted, at the board of brokers, or at public or private sale, at their option, on the non-performance of this promise; applying the net proceeds to the payment of this note, including interest, and accounting to us for the surplus, if any. In case of deficiency, we promise to pay to the holder of this note the amount of such deficiency, forthwith after such sale, with legal interest.

COFFIN & STANTON.

(Endorsed:) 9, 23, '95.

8,000 Debenture Co. 5's, at 5	400
4,000 Santa Cruz 5's, at 60	2,400
2,000 N. Y. C. Suburban 6's, at 65	1,300
	$4,100

The securities originally deposited to secure this note, which were withdrawn by Coffin & Stanton and replaced by the bonds
216 in question, were three $1,000 bonds of the Illinois Central Railroad Company. The endorsement on the back of the note means that the receiver of Coffin & Stanton notified us that a decree of the court had authorized him to value the Santa Cruz bonds at 60, and he reduced them to possession by crediting them

at 60 on the back of the note. There are credits for New York City Suburban bonds and Debenture Company 5's on the back of the note. The debenture bonds were originally held with the note, and the New York Suburban bonds were substituted. At the time the bank loaned this money to Coffin & Stanton, it had no notice or knowledge of any facts tending to show anything in regard to the title of Coffin & Stanton to these bonds. The only notice or knowledge we had in regard to the financial condition of the defendant was what Coffin & Stanton mentioned here in their letter. The letter simply speaks of the general condition of the city of Santa Cruz, describing it as one of California's most flourishing towns, but gives no statement of its indebtedness. I did not know of its indebtedness at the time of this loan.

Cross-examination:

The credit given on this note amounted to $4,100; that is given only by crediting the value of the securities on the note. No cash has been paid. This was the first transaction we have ever had with Coffin & Stanton. We made no inquiries about the legal title to the bonds, nor in regard to the legality of the issue.

We knew nothing more about the firm of Coffin & Stanton at that time than what we got from Dun's and Bradstreet's reports.
217 We knew of them by reputation. We did not know that they acted as the fiscal agents for different cities and municipalities, nor that they were fiscal agents for the city of Santa Cruz. I knew nothing about the city of Santa Cruz. We did not exactly make this loan blindly without knowing the value of the collaterals. We took their statement that they made in regard to the value of the Santa Cruz bonds, and presumed that they were honorable gentlemen, and acted on their statement.

We did not verify it. They gave a valuation of the Santa Cruz bonds at 101, as stated in one of their letters.

That FREDERICK W. HILL, a witness on behalf of plaintiff, being duly sworn, testifies as follows:

I reside at Bangor, Maine, and am director in the Kenduskeag national bank. By letter dated May 15, 1894, Coffin & Stanton wrote the Kenduskeag national bank, inquiring if they were in a position to entertain a proposition for a collateral time loan. After some correspondence, on May 29, 1894, the bank accepted by telegram the proposition of Coffin & Stanton to take their promissory note of $10,000, on six months, with interest at the rate of 5 per cent., with twelve gold refunding 5 per cent. bonds of the city of Santa Cruz, Cal., for $1,000 each, as collateral security. The note and bonds purporting to be executed by the officers of the defendant on April 16, 1894, being numbers 136, 137, 138, 145, 147, 148, 149, 150, 151, 152, and 153, were delivered to the bank in due course.

The note bore date May 31, 1894. The money was paid on
218 Coffin & Stanton's draft on May 29, 1894, for $10,000, by the check of the bank for $10,000, dated May 31, 1894, which was paid in due course. No part of the principal or interest due

on the loan made to Coffin & Stanton has been paid. The bank is still in possession of the bonds. At the time the bank came into possession of these bonds, it had no specific knowledge as to the title of the persons from whom it received possession, or as to the relations between Walter Stanton and the defendant, but assumed, as Coffin & Stanton were able to furnish these bonds as collateral for their notes, they were rightfully in possession of them. As to the indebtedness of the defendant existing at the time these bonds were taken, W. H. S. Lawrence, then cashier of the bank, since deceased, telegraphed to a prominent resident of Santa Cruz, A. P. Swanton, and inquired as to the bonds, and was in receipt of a reply that the bonds were good. The bank also relied upon the circular of Coffin & Stanton, showing the financial condition of the city of Santa Cruz.

Cross-examination:

The pledge has not been reduced to absolute ownership. The bonds are still held as collateral for the note.

The negotiations which led up to the making of the loan were entirely by correspondence between W. H. S. Lawrence, the cashier of the bank, under my personal direction, and Messrs. Coffin & Stanton. On the part of the borrower, the bank knew only the firm of Coffin & Stanton. The loan represented $10,000 in cash, money advanced at the time. The bank never had had any business with Coffin & Stanton up to this time, during my ten
219 years' connection with it, nor afterwards. The bank received no letters, printed statements, circulars, opinion of attorneys, or copies of opinions of attorneys concerning said bonds, or the financial condition of the city of Santa Cruz, other than the letters and circulars hereinafter set out.

We had no knowledge regards the bonds of the city of Santa Cruz, except the recommendations of Coffin & Stanton, which firm we supposed to be perfectly reliable, having heard no intimation to the contrary at that time, and information which we got from Mr. A. P. Swanton, a prominent resident of Santa Cruz, Cal., in answer to an inquiry as to the value of the bonds. We had no other knowledge regarding the value of the bonds, except the personal knowledge of the city by Mr. H. H. Fogg, one of the directors of the bank. I do not recall having seen or heard of any circular stating that Coffin & Stanton were the fiscal agents of the city of Santa Cruz, and never heard that they were such agents. At the time of taking these bonds, the bank held no other bonds of the city of Santa Cruz; it never held any bonds of the city of Santa Cruz before that time. We have made no effort to collect the note because of the notorious insolvency of the makers. We expect to realize upon the collateral. The correspondence and circulars referred to by me are the following:

A letter of Coffin & Stanton to Kenduskeag national bank, as follows:

220 Coffin & Stanton, bankers, New York, London.

72 BROADWAY, NEW YORK, *May* 15, 1894.

Kenduskeag national bank, Bangor, Maine.

GENTLEMEN: If you are at the present time in a position to entertain an application for a col-ateral time loan, kindly advise us, and we shall be pleased to submit you a proposition.

We feel confident that we can satisty you as to collateral, and offer you an attractive rate.

Yours very truly, COFFIN & STANTON.
T.

Credited and advised, 5–17.

Letter of Coffin & Stanton to Kenduskeag national bank, dated May 19, 1894, as follows:

Accepted May 29.

Coffin & Stanton, bankers, New York, London.

72 BROADWAY, NEW YORK, *May* 19, 1894.

Kenduskeag national bank, Bangor, Maine.

GENTLEMEN: We beg to acknowledge *to* receipt of your favor of the 17th inst., and in accordance therewith we submit you a proposition for a loan of $10,000 to run three, five, or six months, or on fifteen days' call, at the rate of 5 per cent. per annum, and offer you as collateral security thereto:

221 $12,000 city of Santa Cruz, Cal., gold refunding 5 per cents, at 101.

We enclose circular describing this issue, giving all the necessary details concerning the same. Santa Cruz is a prosperous city, within the immediate vicinity of San Francisco. The city owns its own water plant, the supply of which is brought by gravity from the mountains, fourteen miles distant. Water is an absolute necessity in Santa Cruz, and is in demand for irrigation, in addition to its ordinary uses.

The population supplied by this water system is about eleven thousand. The figures of population on the enclosed circular are of the corporate limits of the city only. These limits have not been enlarged for many years. The inhabitants of the city of Santa Cruz are principally from New York and the New England States. Santa Cruz is located in the most highly improved portion of the State of California, and is one of its most thriving cities. If you desire any further information concerning these bonds, we shall be pleased to furnish the same to you.

Trusting that this proposition may commend itself to your good judgment, and awaiting an early reply, we remain,

Yours very truly, COFFIN & STANTON.

(Inclosure.)

The circular of Coffin & Stanton, relating to Santa Cruz bonds, is in the same words and figures as the circular hereinbefore set out, commencing at page 72, line 21, hereof.

222 Letter of Coffin & Stanton to Kenduskeag national bank, dated May 25, 1894, as follows:

Coffin & Stanton, bankers, New York, London.

72 BROADWAY, NEW YORK, *May* 25, 1894.

Kenduskeag national bank, Bangor Maine.

GENTLEMEN: We beg to acknowledge the receipt of your favor of the 23d inst., and note your remarks concerning note and collateral recently offered to you for a loan of $10,000.

In reply thereto, we beg to state that we propose giving you our note, duly signed by the firm. You will find us rated in any of the commercial agencies.

We are not acting as brokers in this matter. Neither are we in any manner connected with the New York stock exchange, dealing as we do, almost exclusively in municipal securities.

Trusting that we may hear favorably from you, we remain,

Yours truly, COFFIN & STANTON.

Telegram of A. P. Swanton to Lawrence, dated May 28, 1894, as follows:

The Western Union Telegraph Company.

5, 28, 1894.

Received at 2.54 p. m.
Dated Santa Cruz, Calif., 28.

To W. H. S. Lawrence, Bangor, Me.:

223 Yes; two offers have been made here for them, but some eastern bond agents have option.

A. P. SWANTON.

That SAMUEL W. GOODWIN, witness on behalf of plantiff, being duly sworn, testifies as follows:

My name is Samuel W. Goodwin. I am president of the National Bank of Waterville, of Waterville, N. Y. The bank come into possession of a refunding bond of the city of Santa Cruz, purporting to be executed by its officers on April 16, 1894, said bond being number 360. It was given as collateral security to a note of Coffin & Stanton for $5,000, said bond having been substituted by Coffin & Stanton for an Atchison, Topeka & Santa Fe Railroad bond of $1,000, as per letter from Coffin & Stanton of May 3, 1894, which reads as follows:

Coffin & Stanton, bankers, New York, London.

72 BROADWAY, NEW YORK, *May* 3, 1894.

National Bank of Waterville, Waterville, N. Y.

GENTLEMEN: We send you tonight, under separate registered cover, $1,000 Santa Cruz, Cal., refunding 5 per cent. bonds, which kindly exchange, as per substitution blank enclosed, for $1,000 Atchison, Topeka & Santa Fe bond held by you as collateral to our loss of November 20, 1893, for $5,000.

Kindly return the latter bond by registered mail, we insuring the same during transit. We enclose herewith postage for that purpose.

224 We regret exceedingly being obliged to disturb this loan and would not do so could we avoid it.

Yours truly, COFFIN AND STANTON.

T.

The bank held as additional security to this $5,000 note two $1,000 Atchison, Topeka & Santa Fe Railroad bonds, which were sold and the proceeds amounting to $1,280 were applied on the $5,000 note. The bank is still in possession of the bonds. In the year 1890, the National Bank of Waterville discounted a note for Coffin & Stanton, taking as collateral security for said note, $4,000 of the city of Santa Cruz bonds. I made a thorough investigation of the bonds at that time, having sent to me from Coffin & Stanton copies of letters from G. Bowman, then mayor of Santa Cruz, and also being told by Mr. Stanton that they had bought the bonds, and that they were the actual owners thereof, and they did not at that time handle any bonds except such as they were the actual owners of.

I understand and believed that Coffin & Stanton were the actual owners of said bond of $1,000, and that the statement made by Mr. Stanton was true. The bank made no investigation with reference to the indebtedness of the defendant existing at the time these bonds were taken, as we relied upon the previous representations and the investigation then made regarding Santa Cruz and other bonds and upon the letter and prospectus of the Santa Cruz bonds.

225 Cross-examination:

In addition to the Atchison, Topeka & Santa Fe Railroad bonds already spoken of, we held as collateral $5,000 Fort Scott water bonds. The Fort Scott water bonds we still held, but we think them to be of little or no value.

None of the collateral originally held by us was released, except by the exchange of one $1,000 Atchison, Topeka & Santa Fe Railroad bonds for one Santa Cruz bond as herein stated.

The Santa Cruz bond was sold at public sale in New York city and the National Bank of Waterville became purchaser on that sale, and the absolute owner thereof.

About May 4, 1894, I received a letter from Coffin & Stanton, stating that they desired to exchange the Atchison, Topeka & Santa

Fe bond we then held for the $1,000 Santa Cruz bond which we now hold. Attached to the letter was a prospectus of the Santa Cruz bonds, and on the strength of the statement our bank made the exchange, and thus came into possession of the Santa Cruz bond as collateral security. The letter from Coffin & Stanton to the bank was the letter hereinbefore referred to. A printed prospectus enclosed therewith was in the same words and figures hereinbefore set out at page 72, line 21 hereof. I conducted the negotiation on the part of the National Bank of Waterville, and by correspondence with Coffin & Stanton. The loan for which the Santa Cruz bond was taken as collateral represented an actual loss of $5,000 made November 20, 1893. From 1890 up to the time of the failure of Coffin & Stanton, there was no time when our bank did not hold from $3,000 to $10,000 of the firm's paper.

226 At the time of taking the Santa Cruz bonds as collateral the bank did not hold any of Coffin & Stanton's obligations which were due and unpaid. The information given or statements made to the bank concerning the refunding bonds of the city of Santa Cruz prior to the time of their being taken by the bank were the information and statement contained in the letter and prospectus hereinbefore set out. The information to the bank concerning the financial condition of the city of Santa Cruz was the information contained in the prospectus hereinbefore set out. The only letters, printed statements, circulars or opinions concerning the said bonds or the financial condition of the city of Santa Cruz which the bank received were the letter and prospectus hereinbefore set out and the copy of the letter of G. Bowman, the mayor of Santa Cruz, to Coffin & Stanton, dated May 22, 1890, in the following words and figures:

SANTA CRUZ, CAL., *May* 22, 1890.

Messrs. Coffin & Stanton.

GENTLEMEN: Your telegrams today received. Your interests are our interests in the matter referred to. We will use every effort to counteract the influence which is being made.

The Santa Cruz water bonds you hold are perfectly good, substantiated by 95 per cent. of the inhabitants of this city, notwithstanding the reports of parties who are trying to cast odium on same.

Santa Cruz is going ahead fast, improvements of all kinds are booming, consequently the city's bonds are getting stronger every day.

227 If you see no objections would you please give the name of the official. Is it not an *ex officio*, who, for a probable reason, lost his place?

Yours, etc.,

G. BOWMAN, *Mayor*.

P. S.—To partially show the state of the water-bond question, this city was assessed extra the last year about $40,000, and I venture to assert that there is no city of our population who has as small — of delinquents in the United States. Our tax was more than double,

but our people met it grandly. The cry was all for the interests of our new water works. More you cannot say for a place.

Yours, etc., G. B.

We relied upon the prospectus and previous investigation of other Santa Cruz bonds, and the statement of Coffin & Stanton, and the letter of G. Bowman, mayor. The knowledge we had concerning the value of the bonds at the time they were taken by the bank and the financial condition of the city of Santa Cruz was derived from the prospectus sent us by Coffin & Stanton and the knowledge obtained in the previous investigation. At the time of the taking of this Santa Cruz bond by the bank it held no other bonds of the city of Santa Cruz; it held at a prior time four $1,000 bonds of the city of Santa Cruz. At the time of taking this refunding bond of the city of Santa Cruz, the bank did not know that Coffin & Stanton were fiscal agents for the city of Santa Cruz. When the loan
228 for which this bond was collateral was made, we sent a draft to the firm of Coffin & Stanton for the same, being $5,000, less the interest.

A claim has been presented to the receiver of Coffin & Stanton, but no payment has been made.

That EDWARD L. SPALDING, a witness on behalf of plaintiff, being duly sworn, testified as follows:

I reside at Webster, Mass., and am cashier of the First National Bank of Webster. The bank held notes of Coffin & Stanton, bankers, of New York, on which it held as collateral certain bonds. Those bonds which we originally held Coffin & Stanton recalled and substituted in their place four refunding bonds of the city of Santa Cruz, purporting to be executed by its officers on the sixteenth day of April, 1894, said bonds being numbers 22, 277, 78, and 79, of $1,000 each. A part of the loan for which these bonds were collateral, has been paid. They paid $2,400 in cash on October 2, 1894. The bank is still in possession of the bonds. The knowledge that the bank had when it came into possession of these bonds, relative to the title of the same of Coffin & Stanton was that they were advertised by Coffin & Stanton for sale. They claimed that they were worth in market 101 to 102, and they desired to exchange them for collateral which the bank held. The bank had nothing to do with Walter Stanton individually. It made no investigation with reference to the indebtedness of the defendant, but had the printed statement of Coffin & Stanton, showing that the net debt of the defendant was $40,000.

229 Cross-examination:

When the loan referred to was made to Coffin & Stanton the bank held bonds of the city of Harriman, Tennessee, New York City Suburban water bonds, and Illinois Central Railroad bonds as collateral. When $2,400 was paid two Illinois Central bonds were withdrawn. The bank loaned Coffin & Stanton $10,000, and took their notes with the securities just mentioned as collateral. After the failure of Cof-

fin & Stanton the bank sold $16,500 of the New York City Suburban bonds, $3,000 city of Harriman bonds, and $4,000 city of Santa Cruz bonds at public auction, on December 19, 1894, and bid in the same for $10,440. The board of directors conducted the negotiations on the part of the bank, and the borrowers themselves on their part. We received from Coffin & Stanton a letter as follows:

Loan department.

Coffin & Stanton, bankers, New York, London.

72 BROADWAY, NEW YORK, *Feb.* 20, 1894.

First national bank, Webster, Mass.

GENTLEMEN: Will you kindly advise us if you are in a position to entertain an application for a collateral loan. If so, we would be pleased to submit you a proposition. We think we can satisfy you both as to rate and collateral.

Yours truly, COFFIN & STANTON.
T.

230 And another letter as follows:

Coffin & Stanton, bankers, New York, London.

72 BROADWAY, NEW YORK, *Feb.* 28, 1894.

First national bank, Webster, Mass.

GENTLEMEN: We have your favor of the twenty-seventh inst., and in accordance therewith, we have this day drawn upon you, through the Manhattan Co. bank of this city, for $10,000, with $7,000 Illinois Central gold 4's and $5,000 city of Harriman, Tenn., gold 6's attached. We hand you herewith our note for $10,000, under date of March 1, 1894, to run four months at the rate of 5 per cent., which we trust will be satisfactory to you.

Kindly honor our draft upon presentation, and oblige,

Yours truly, COFFIN & STANTON.
T.

(Inclosure.)

The original loan was for cash. At the time of the taking of the Santa Cruz bonds as collateral, the bank held obligations of Coffin & Stanton which were due and unpaid. Coffin & Stanton, as makers and endorsers of notes, were indebted to the bank in the sum of $20,000. The information given or statements made to the bank concerning the refunding bonds of the city of Santa Cruz prior to their being taken by the bank were a letter in the words and figures following:

231 Coffin & Stanton, bankers, New York, London.

72 BROADWAY, NEW YORK, *May* 3, 1894.

First national bank, Webster, Mass.

GENTLEMEN: We send you tonight, under separate cover, $1,000 Santa Cruz, Cal., refunding 5 per cent. bond, which kindly exchange

as per substitution blank enclosed for $1,000 Illinois Central 4 per cent. bond, held by you as collateral to our loan of March 1, 1894, for $10,000. Please send the latter bond by return registered mail, we to insure the same during transit. We enclose herewith postage for that purpose. Santa Cruz is located within a very short distance of San Francisco and is one of California's most active towns. We enclose herewith a circular, giving more detailed description. We regret exceedingly being obliged to disturb this loan and would not do so now were it avoidable.

Yours truly, COFFIN & STANTON.
T.

Enclosures.

and a circular which is in the same words and figures as the circular hereinbefore set out commencing at page 72, line 21, hereof.

The bank had no other information regarding the financial condition of the city. The only knowledge we had concerning
232 the value of the so-called refunding bonds was the knowledge derived from the circular hereinbefore referred to and from two letters of Coffin & Stanton, as follows:

Coffin & Stanton, bankers, 72 Broadway.

NEW YORK, *Aug.* 6, 1894. ——, 196-.

First national bank, Webster, Mass.:

We wish to withdraw from loan Apr. 27, '94, of $10,000 the following securities:

2,000 Illinois Cent. 4's, 98..... 1,960

and substitute:

2,000 Santa Cruz 5's, at 101..... 2,020

Yours respectfully, COFFIN & STANTON.
J. O. HALLASON.

Coffin & Stanton, bankers, 72 Broadway.

NEW YORK, *May* 3, 1894. ——, 167-.

First national bank, Webster, Mass.:

We wish to withdraw from loan 4, 1, '94, of $10,000, the following securities:

1,000 Ill. Central gold 4's, at 100..... $1,000

and substitute:

233 1,000 Santa Cruz, Cal., 5's, at 101..... $1,010

No. 278, due 1925.

Yours respectfully, COFFIN & STANTON.
A. F. BABCOCK.

We had no other knowledge regarding the financial condition of the city of Santa Cruz. We have no letter or circular from Coffin

& Stanton in which they speak of themselves as being, or having been, the fiscal agents of the city of Santa Cruz. The bank never held any bonds of the city of Santa Cruz before that time.

At the time of the taking of the refunding bonds by the bank it did not know that Coffin & Stanton were fiscal agents of the city of Santa Cruz. The original loan was paid by us by a New York draft for $10,000, less interest for four months. Coffin & Stanton's note was dated March 1, 1894, and renewed July 3, 1894. The notes were sent to New York city for collection and the indorsed note of $10,000 was protested.

That LUKE HANSARD, a witness on behalf of plaintiff, being duly sworn, testifies as follows:

I am manager of Martin's Bank, Limited, of London. On the twenty-eighth of May, 1894, we made Coffin & Stanton, Limited, of London, an advance of £5,000 upon $25,000 city of Santa Cruz five per cent. bonds as per Pledge note signed by them. The Pledge note is signed by the officials of Coffin & Stanton, Limited, of London, and is in the words and figures following:

234 Form No. 6.

LONDON, 28*th May*, 1894.

To Martin's Bank, Ltd., 68 Lombard street.

GENTLEMEN: In consideration of your advancing to us the sum of five thousand pounds (£5,000) on demand from this date, at interest at five (five) per cent. per annum, we deposit with you the securities enumerated on the other side, which we hereby guarantee to be of the present value there stated; and we undertake to maintain from time to time a margin in value of ten per cent. on the amount of your cash advance by placing additional security in your hands should this become necessary through depreciation of those which we now lodge or which may hereafter, either by way of substituted or additional security be lodged with you, in default whereof, and in default of our repaying to you the amount owing to you as before mentioned, or in default of our maintaining margin as above, you are hereby authorized, without any further authority, to realize the securities you may hold for the time being, and the purchaser shall not be concerned to inquire whether there has been any such default or whether your right to realize the securities has arisen. You shall hold us at liberty to withdraw any of the above securities in exchange for others of at least equal value, or on payment of an equivalent part of your advance.

It is hereby agreed that the securities — have referred to
235 will be held by you, generally, against any advances which we may be under to you as well as against this particular loan.

(Signed) COFFIN & STANTON, LIMITED.
HERBERT B. MONTEFIORE,
CHAS. B. LUDWIG, *Directors.*

(Stamp 6d.)

Description of securities—value.

$25,000 city of Santa Cruz, California, five per cent. municipal bonds at 100, £5,000.

Exhibit No. 1.

The security for the aforesaid loan of £5,000 was returned to Coffin & Stanton, Limited, of London, as follows: $3,000 on the thirty-first of May, $2,000 bonds were exchanged for $2,000 bonds of city of Santa Cruz, the said $2,000, six per cent. being pledged as part cover for the loan made to Coffin & Stanton on the tenth of April, 1894, for 22,400. The original pledge note of this loan of the tenth of April, 1894, is in the words and figures following:

Form No. 6.

LONDON, 10*th April*, 1894.

To Martin's Bank, Ltd., 68 Lombard street.

GENTLEMEN: In consideration of your advancing to us the sum of twenty-two thousand four hundred pounds for a period of three months from this date, at interest of six (6) per cent. per annum, we deposit with you the securities enumerated on the other side,
236 which we hereby guarantee to be of the present value there stated; and we undertake to maintain from time to time a margin in value of ten per cent. on the amount of your cash advance by placing additional security in your hands should this become necessary through depreciation of those which we now lodge or which may hereafter, either by way of substituted or additional security be lodged with you, in default whereof, and in default of our repaying to you the amount owing to you as before mentioned, or in default of our maintaining margin as above, you are hereby authorized, without any further security, to realize the securities you may hold for the time being, and the purchaser shall not be concerned to inquire whether there has been any such default or whether your right to realize the securities has arisen. We shall hold ourselves at liberty to withdraw any of the above securities in exchange for others of at least equal value, or on payment of an equivalent part of your advance.

It is hereby agreed that the securities here referred to, will be held by you generally against any advance which we may be under to you as well as against this particular loan.

(Signed) COFFIN & STANTON, LIMITED.
HERBERT B. MONTEFIORE, *Director.*
F. H. BURR, *Secretary.*

(Stamp 6d.)

237	Description of securities.		Value
$12,000	Gravesend local improvement loan, at.....	90	£2,060
46,000	Salt Lake & Ogden Gas & Electric Light Co., 6 per cent. 1st mg., at.....	90	8,280
57,000	New York City Suburban Water Co., 1st mge, at.....	50	5,700
46,000	Toledo & Ohio Cent'l Exten. R'l'y Co., 1st mge., 5 per cent.....	50	4,600
6,000	Topeka Water Co., 1st mge., 6 per cent.....	50	600
2,000	City Water Co. of Santa Cruz, 1st mge., 6 per cent.....	100	400
12,000	Santa Fé county, New Mexico, 5 per cent. funding bond.....	85	2,040
5,000	Littletown Water & Electric Light Co., 6 per cent.....	100	1,000
8,000	Consolidated Gas & Electric Light Co. of Worcester, 6 per cent.....	50	800
5,000	Chattanooga Water & Electric Co., 6 per cent., 1st mge.....	50	500
10,000	Debenture Guarantee & Ass'ce Co. of Great Britain & America, 6 per cent.....	100	2,000
4,350	New Municipal Trust Co., deferred stock....	40	1,740
			£29,720

238 The balance of the said security of the $25,000 bonds of the city of Santa Cruz, five per cent. namely, $20,000, was handed to Coffin & Stanton, Limited, on the fourteenth day of June, 1894. The 4,000 balance of the said loan of £5,000 loan of the twenty-eighth of May, 1894, was repaid by being debited to the current account of Coffin & Stanton, Limited, of London, but practically by the proceeds of a sight draft for $20,000 on New York, drawn by Coffin & Stanton, Limited, of London, on Coffin & Stanton of New York. This draft had attached thereto $12,000, city of Santa Cruz, six per cent. bonds, and $8,000 city of Santa Cruz five per cent. bonds. This draft was sent to New York to our agents, Messrs. Heidelbach, Ickelheimer & Co., presented by them, was dishonored and is still in our possession. It is in the words and figures following:

LONDON, 14*th June*, 1894.

Exchange for $20,000.

At sight pay this first of exchange (second unpaid) to the order of Martin's Bank, Ld., twenty thousand dollars ($20,000) with $12,000. City Water of Santa Cruz, six per cent., and $8,000 city of Santa Cruz, five per cent. bonds attached. Value received, which place to account.

(Signed) COFFIN & STANTON, LIMITED.
HERBERT B. MONTEFIORE,
CHAS. B. LUDWIG, *Directors.*

To Messrs. Coffin & Stanton, 72 Broadway, New York.

Endorsed by Martin's bank to Heidelbach, Ickelheimer, of New York, but returned dishonored.

239 The bonds attached to this draft are still held by us, and together with the $2,000, five per cent. city of Santa Cruz bonds, exchanged for the $2,000, six per cent. of the loan of tenth of April, 1894, have been sent to Messrs. Street, Wykes & Co., of New York, to enforce payment of coupons and bonds, if necessary.

The numbers of these Santa Cruz bonds, as aforesaid, are: $12,000, six per cent., Nos. 64, 70, 82, 84, 85, 94, 95, 97, 122, 123, 124; coupon November, 1894, attached.

$8,000, five per cent. bonds, Nos. 184, 185, 186, 201, 202, 203, 204, 205; coupon April, 1895, attached.

$2,000, five per cent. bonds, No. 187, 188, with coupon November, 1894, attached.

All the above bonds are $1,000 each.

We had no knowledge at the time we came into possession of these bonds relative to the title to the same of the persons from whom we received possession. We assumed, as a matter of course, that Coffin & Stanton, Limited, of London, were properly possessed of these bonds and had given value for them, and we still believe this to be the fact. We had no knowledge, nor have we any now, of any relations between Walter Stanton and the defendant, The City of Santa Cruz.

We made no investigation with reference to the indebtedness of the defendant existing at the time these bonds were taken. We were dealing with a corporation, namely, Coffin & Stanton, Limited, of London, which was highly esteemed by us.

240 Cross-examination:

The only other securities we have on account of Coffin & Stanton, Limited, are those given in the schedule on the back of the pledge form, of the tenth of April, 1894, hereinbefore set out. Our realization account shows charges against Coffin & Stanton, Limited, aggregating £34,036:7:3 and credits from payments, dividends and proceeds of sales of some of the securities aggregating £11,930:13:9. The realizations were at the market value of the securities sold. At present we hold these and other bonds as collateral to our advances not yet discharged. Coffin & Stanton, Ltd., went into liquidation on the twenty-sixth day of October, 1894.

On the tenth of April, 1894, we were asked to make a loan of £22,400, and agreed to do so after writing off then existing loans of £14,000. The £5,000 of the twenty-eighth of May, 1894, was to the best of my recollection made at the request of Mr. Ludwig, who stated that Coffin & Stanton, Limited, of London, had to pay the City Bank of London £5,000 for a draft with these bonds attached.

The purchase of the $20,000 draft of the fourteenth of June, 1894, was also arranged with Mr. Ludwig.

I conducted the negotiations on the part of the bank and Mr. Montefiore or Mr. Ludwig, or both, on the part of the borrower.

The bank received a letter from Coffin & Stanton, Limited, of London, dated twenty-eighth of May, 1894, relating to the £5,000 loan which is in the words and figures following:

241 43 THREADNEEDLE STREET,
LONDON, E. C., *28th May*, 1894.

Martin's Bank, Limited, 68 Lombard street, E. C.

DEAR SIRS: We are arranging to exchange the city of Santa Cruz Water Co. bonds, held by our clients upon this side, for the five per cent. municipal bonds of the city of Santa Cruz; but for a day or two we are unable to obtain these water company bonds, and, therefore, desire you to carry for us the £5,000 draft which we have due this day, holding as security therefor the $25,000 city of Santa Cruz, five per cent., municipal bonds attached to this draft, until such time as we can obtain the water company bonds, which we propose attaching to a draft upon Messrs. Coffin & Stanton, of New York.

We might add that we have to effect the exchange of $89,000 of these Santa Cruz bonds, so that we may need your assistance in one or two instances to enable us to carry these exchanges through.

Yours faithfully,

COFFIN & STANTON, LIMITED.
(Signed) HERBERT B. MONTEFIORE, *Director.*
F. H. BURR, *Secretary.*

242 Also, a letter from Coffin & Stanton, Limited, dated the eighth of June, 1889, which is in the words and figures following:

Coffin & Stanton, Limited, 43 Threadneedle street.

LONDON, E. C., *8th June*, '94.

Luke Hansard, Esq.

DEAR SIR: We beg to hand you herewith draft upon Coffin & Stanton, New York, for $5,000, which please place to the credit of our account. We also hand you a cheque for £1,000, which please place to the credit of our loan account.

The $5,000, Santa Cruz Water Company, six per cent. bonds, which are to be attached to the above-mentioned $5,000 draft, you will find are held by you as security for our loans ($3,000 in the £5,000 loan recently made with you and $2,000 in our old loan.)

Yours faithfully,

COFFIN & STANTON, LIMITED.
(Signed) F. H. BURR, *Secretary.*

Please be sure and send the six per cent. Santa Cruz Water Company bonds, not the five per cent. Santa Cruz municipal bonds.

That is all the correspondence we have relating to these loans. The loans for which the Santa Cruz bonds were taken as collateral represent money at the time advanced. It was to enable Coffin & Stanton, Limited, to pay for the said $25,000, referred to in the loan of the twenty-eighth of May, 1894.

243 The bank never had any business relations with Coffin & Stanton, of New York, except to sell through them, as brokers, some Northern Pacific bonds. All our transactions were with Coffin & Stanton, Limited, of London, on their own account, and by their own order.

At the time of taking the Santa Cruz bonds as collateral the bank held none of Coffin & Stanton's obligations, which were due and unpaid. No statements were made to the bank by Coffin & Stanton. Our business dealings being all with Coffin & Stanton, Limited, of London. We received no letters, printed statements or circulars, or opinions of attorneys concerning the said bonds, or the financial condition of the city of Santa Cruz. We made no investigation concerning the said bonds of the said city of Santa Cruz. We had no actual knowledge of the value of the five per cent. bonds, but relied upon the integrity of Coffin & Stanton, Limited, of London, who, themselves, on the back of the pledge form, in their handwriting, valued these bonds at one hundred or par.

We had no knowledge regarding the city of Santa Cruz or its financial condition, beyond that the city was generally considered in London as good for its indebtedness. We have never received or heard of any letter or circular from Coffin & Stanton, in which they speak of themselves as the financial agents of the city of Santa Cruz, nor were we, that is Martin's bank, aware that Coffin & Stanton of New York were the fiscal agents of the city of Santa Cruz. We hold no other bonds of the city of Santa Cruz. We had never held any bonds of the city of Santa Cruz before that time. On making the loans referred to hereinbefore, the respective
244 amounts were credited to the current account of Coffin & Stanton, Limited, of London, on the same dates as those of the loan forms and draft.

Coffin & Stanton, Limited, is in liquidation and little or no dividend is expected from them. We have a judgment against Coffin & Stanton of New York for an unpaid draft $12,500 due tenth of September, 1894, which has so far produced nothing, and other securities besides those of the city of Santa Cruz are opposed, whilst others are in process of reorganization.

In addition to our claims under the loan of tenth of April, 1894, and the $20,000 draft of the fourteenth of June, 1894, we claim to have a lien upon the securities *en bloc* held by us for the said unpaid draft of $12,500, of the sterling equivalent of £2,565 : 2 : 1 in addition to which we claim interest to date.

That JOHN EDWARD BOOTH, a witness on behalf of plaintiff, testifies as follows:

I am secretary of the Northern Counties Investment Trust (Limited). In the month of September, 1893, the trust company received from the American Debenture Co., through Coffin & Stanton, Limited, three bonds of $1,000 each of the City Water Company of Santa Cruz, California, as part collateral for a loan of $1,000. In the month of May, 1894, the said bonds were exchanged for three bonds of the city of Santa Cruz, purporting to be executed by its officers

on the sixteenth day of April, 1894, being numbers 181, 182, 183. No part of the loan for which they were taken as collateral has been paid. The trust company is still in possession of the bonds.

245 The first maturing coupons on each falling due, on April 16, 1895, were lodged with Mr. A. H. Waite on June 13, 1895. The trust company, at the time it came into possession of these bonds had no knowledge or notice relative to the title to the same of the person or persons from whom it received possession, nor as to the relations between Walter Stanton and the defendant. It made no investigation with reference to the indebtedness of the defendant existing at the time these bonds were taken.

Cross-examination:

The bonds of the following companies were originally lodged with us as security for the loan, the Santa Cruz being afterwards received as substitutes:

Kansas Water & Light Co.	$25,000
New York Suburban Water Co.	25,000
United Terminal Railway Co.	18,000
Topeka Water Co.	5,000
Indiana Water Co.	10,000
Consolidated Gas & Electric Light Co. of Westchester county	9,000
City Water & Light Co. of Abilene	1,000
Chillicothe Water & Light Co.	12,000

The transaction connected with the taking of the collateral mentioned was a loan of $100,000 to the American Debenture Co., then called the Debenture Guarantee and Assurance Company of Great Britain and America. The loan was secured by the debentures of that company, supported by the collateral mentioned in the last answer. Several of the collateral bonds have been exchanged on the substitution of others in the customary manner.

246 On the suspension of Coffin & Stanton of New York, agents for the American Debenture Company, the Northern Counties Investment Trust Company became the owner of the collateral by virtue of the terms of the trust agreement entered into when the loan was effected. No value was placed upon the collateral.

The negotiations were conducted with Messrs. Coffin & Stanton Limited, and the collateral was received from them as an ordinary loan transaction. The loan for which the Santa Cruz bonds were taken as collateral represented money advanced at the time and nothing else. No previous obligation was in existence.

The trust company had previous business relations with Coffin & Stanton from the time of the granting of the loan in the month of January, 1891, down to the time when the city of Santa Cruz bonds were received in substitution for those of the City Water Co. Such business relations related to the substitution or the exchange of bonds in the usual way. There may have been other business relations with Coffin & Stanton during that period, but they do not affect the

Santa Cruz bonds or the said loan. At the time of the taking of the Santa Cruz bonds as collateral, the trust company did not hold any of Coffin & Stanton's obligations which were due and unpaid. Coffin & Stanton gave no information and made no statement, nor did any other person or persons, to the trust company concerning the so-called refunding bonds of the city of Santa Cruz, beyond that contained in the correspondence; nor any statement concerning the financial condition of the city of Santa Cruz other than shown in the correspondence attached hereto.

247 No investigations were made by the trust company concerning the said bonds of the city of Santa Cruz, other than that which appears in the correspondence. Nor had we any knowledge concerning the value of the bonds other than such as appears in such correspondence. At the time of the taking of the refunding bonds we did not know that Coffin & Stanton were fiscal agents for the city of Santa Cruz. The loan was paid to the borrowers as follows:

£	s.	d.			
947	3	9	March	26,	1891
956	16	9	June	4,	"
478	19	3	"	11,	"
191	14	8	"	17,	"
472	14	9	Aug.	29,	"
1,688	15	3	Sept.	25,	"
93	16	5	Oct.	5,	"
661	8	4	"	14,	"
188	0	2	Nov.	7,	"
752	0	9	"	17,	"
564	0	7	"	21,	"
188	0	2	Dec.	8,	"
1,786	1	10	"	17,	"
1,128	1	2	"	23,	"
188	0	2	Jan.	4,	1892
471	0	0	"	19,	"
1,884	0	0	"	25,	"
188	0	0	Feb'y	3,	1893
5,654	8	0	May	23,	"
£18,483	12	0			

248 The balance was represented by commissions, insurances, premiums, trustees' fees, etc., making up a total of twenty thousand pounds (£20,000), say one hundred thousand dollars ($100,000).

The correspondence referred to in my foregoing testimony is as follows:

Coffin & Stanton, Limited, 47 Old Broad street, London, E. C.

SEPTEMBER 18, 1890.

The Northern Counties Investment Trust, Limited, 8 Piccadilly, Bradford.

DEAR SIRS: Referring to our conversation with your Mr. John Henry Wade in reinsurance of debentures of the Debenture Guarantee & Assurance Company of Great Britain and America, we desire to make the following proposition:

1st. That the debenture company issue a special series of 4½ per cent. sterling debentures for £20,000, hypothecating as security therefor an equivalent amount and an additional margin of 5 per cent. of the first-mortgage gold bonds of various enterprises situated in the United States (exchange to be figured at 4.86½ par value gold).

The securities to be hypothecated to be as follows:

$11,000 Consolidated Gas & Electric Light Co. of Westchester Co., N. Y., 1st 6 per cents.
11,000 Indiana Water & Light Co. 1st 6 per cents.
11,000 Fort Madison, Iowa, Water Co. 1st 6 per cents.
10,000 Kansas Water & Light Co. 1st 6 per cents.
10,000 Chillicothe, Missouri, Water & Light Co. 1st 6 per cents.

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10,000 Saratoga Gas & Electric Light Co. 1st 6 per cents.
10,000 Topeka, Kansas, Water Co. 1st 6 per cents.
10,000 Crawfordville, Indiana, Water & Light Co. 1st 6 per cents.
10,000 Nebraska City Water & Light Co. 1st 6 per cents.
10,000 United Terminal Railway Co. 1st 6 per cents.

$103,000 equivalent to £21,171, 5.85 per cent. margin over £20,000.

2nd. These bonds to be hypothecated with the New Municipal Trust Company of London, or with some other trustee to be mutually agreed upon, to secure the aforementioned issue of 4½ debentures.

3rd. The debentures to be in denominations of £500, £200, and £100, or such other denominations as you deem best. The said debentures to mature seven years from date of issue, but to be redeemable at par at the option of the company on any coupon day after five years from the date of issue by giving your company, or the holder of such debentures, thirty days' notice thereof in writing.

Coupons to be semi-annual.

4th. The company is to pay you for the insurance of these debentures a premium of 2 per cent. on the par value of debentures as they are issued, and an additional premium of one-half of one per cent. on the first day of —— in each year during the currency of said debentures.

5th. For and in consideration of the payment of the above sums the Northern Counties Investment Trust, Limited, is to guarantee

to the registered holder the debentures and interest in the following manner, viz:

250 A. The trust will pay to the assured any interest on the said debenture which the company shall not pay for sixty days after the date when the same shall become payable thereunder.

B. The trust will pay to the assured any principal sum secured by said debenture which shall have become payable by the company, and which the company shall have made default in paying.

C. Any principal money payable under this policy will be paid within three calendar months after notice in writing from the assured to the trust, requiring the trust to pay the same, and any interest payable under this policy will be paid within one calendar month after notice in writing from the assured to the trust to pay the same.

6th. Your company to undertake the sale of these guaranteed debentures with the express understanding that the debenture company is not to advertise them or to offer them in any way. Your company to receive a commission of 1 per cent. on the par value of all debentures sold. We believe the foregoing practically covers all the principal points discussed by your Mr. Wade and our Mr. Street.

We inclose herewith brief description of the various bonds which it is suggested to hypothecate, and a map showing the situation of the various companies.

In order to facilitate your investigation of these securities we have selected only those issued, portions of which have already been purchased by several trust companies in London. The New Municipal Trust Company have themselves purchased blocks of all of these securities, with one exception, and we refer you to them by permission.

251 Our experience in this class of investments has been uniformly satisfactory. During the past few years we have negotiated between $50,000,000 and $60,000,000, with the result that up to the present time not a single coupon is in default.

All of the bonds which we propose to hypothecate have passed the careful examination to which we invariably subject securities before purchasing. We are, therefore, of the opinion that they cannot but prove desirable security upon which to base the issue of debentures.

Trusting that our proposition will receive your favorable consideration, we are, dear sirs,

Yours faithfully,

COFFIN & STANTON, LTD.,

(Signed) By C. F. STREET,

Managing Director.

Inclosures.

American investments.

Coffin & Stanton, Limited, 47 Old Broad street, London, E. C.

OCTOBER 13, 1890.

DEAR SIRS: We are preparing a proof of the debentures to be in the hands of the printers. Will you kindly inform us what denomination you consider it best for us to have printed? If our memory serves us correctly, you suggested that some debentures should be in the amounts of £500, some £200, and some £100. Will you kindly state what proportion of each will be most likely to meet the requirements of clients.

252 You informed us that your Mr. Booth was in America. When you are next writing to him we would deem it a favor if you will state that the office of Coffin & Stanton is situated at 72 Broadway, New York, and Mr. Street desires to say that his partners there will be exceedingly glad to have the pleasure of an interview with him if he can find an opportunity to call. As we hope that this will not be the last transaction which we shall have with your company, we also think that it will be advisable that the New York firm, as well as ourselves, should have personal associations with some of your officers. We are, dear sirs,

Yours faithfully,

COFFIN & STANTON, LIMITED,

(Signed) By C. F. STREET, *Managing Director.*

Messrs. Wade, Bilbrough, Booth, 8 Piccadilly, Bradford.

Coffin & Stanton, Limited, 47 Old Broad street, London, E. C.

APRIL 4, 1891.

DEAR SIRS: We desire to acknowledge receipt of your letter of the 31st ult.

We will have to leave the further discussion of stamp duties until we hear from Somerset house.

As soon as we hear from you we will endeavor to arrange for an interview, as your Mr. Stanton from New York has just arrived in London. He brings with him business undertakings which we believe may prove of interest to you. At this interview we will finally arrange all details in regard to stamp duties, and will

253 submit first-mortgage gold bonds in place of Fort Madison Water Co. bonds which you now hold, and which you desire us to exchange. We beg to remain,

Faithfully yours,

COFFIN & STANTON, LIMITED,

(Signed) By C. F. STREET, *Managing Director.*

Messrs. Wade, Bilbrough, Booth & Co., 8 Piccadilly, Bradford, Yorks.

Coffin & Stanton, Limited, 47 Old Broad street, London, E. C.

APRIL 20, 1891.

Messrs. Wade, Bilbrough, Booth & Co., 8 Piccadilly, Bradford, Yorks.

DEAR SIRS: We have today returned to you, under cover of registered mail, 10 £100 debentures of Debenture Guarantee & Assurance Co. of Great Britain and America, which we trust will reach you safely.

You will note that we have had the debentures stamped with a 10 — embossed stamp as requested.

We are, dear sirs,

Yours faithfully,

COFFIN & STANTON, LIMITED,

(Signed) By WALTER STANTON.

254 Coffin & Stanton, Limited, 43 Threadneedle street.

LONDON, E. C., *May* 30, 1891.

Messrs. Wade, Bilbrough, Booth & Co., 8 Piccadilly, Bradford, Yorks.

DEAR SIRS: We are in receipt of your favor of the twenty-ninth inst. in regard to the debentures of the Debenture Guarantee & Assurance Co. of Great Britain and America. We will forward you an additional £1,000 debentures on Monday the first prox., and will at the same time forward the following bonds as collateral:

$1,000 Kansas Water & Light Co., 1st 6 per cents.
1,000 United Terminal R'y Co., 1st 6 per cents.
1,000 city of Santa Cruz, California, Water Co., 1st 6 per cents.
1,000 Topeka Water Co., 1st 6 per cents.

You will note that the 10 per cent. margin is fully covered, inasmuch as we forwarded you $500 bonds over the 10 per cent. margin on the last transaction.

We will also forward on Monday, statement of account showing the amount due, etc.

We are, dear sirs,

Yours faithfully,

COFFIN & STANTON, LIMITED,

(Signed) By WALTER STANTON.

P. S.—In what denominations do you require the debentures? We will not forward the debentures until advised regarding this point.

255 BRADFORD, 1*st June*, 1891.

Debenture Guarantee & Assurance Co.

DEAR SIRS: In reply to your letter of May 30th, we think two debentures of £500 each would be most convenient, but before we can accept a bond of the City of Santa Cruz Water Co., as part of the collateral security, we must ask you to be good enough to for-

ward us particulars relating to that company for consideration. We think it is not amongst the lists you have previously furnished. If you will refer to your letter of March 18th, you will find a list of the bonds which you said would be hypothecated when the second £1,000 of debentures was dealt with.

You will observe that this list amounts to a total of $6,000, in place of $5,000 only which you now propose to deposit. Will you please explain why a variation is now sought both in the description and amount of the bonds.

Yours faithfully,

(Signed) WADE, BILBROUGH, BOOTH & CO.

Messrs. Coffin & Stanton, Limited, 43 Threadneedle street, London, E. C.

Coffin & Stanton, Limited, 43 Threadneedle street.

LONDON, E. C., *June* 2, 1891.

In re Debenture Guarantee & Assurance Co.

Messrs. Wade, Bilbrough, Booth & Co., 8 Piccadilly, Bradford.

DEAR SIRS: In reply to your letter of the first inst., we note that two debentures of £500 will be most convenient, and that
256 you would wish to go over the papers regarding the Santa Cruz Water Co. before accepting the bonds of that company as collateral security, but referring to our letter of March 18th, of which the writer was not advised, we find the following bonds enumerated:

$2,000 Saratoga Gas & Electric Light Co., 1st 6 per cents.
1,000 Kansas Water & Light Co., 1st 6 per cents.
1,000 Fort Madison Water Co., 1st 6 per cents.
1,000 Topeka Water Co., 1st 6 per cents.
1,000 United Terminal R'y Co., 1st 6 per cents.

As you do not approve of the Fort Madison Water Co. bond, it would be necessary for us to substitute a bond in its place, but, at the time of the first deposit of collateral security, we did not have a $500 bond, and therefore sent you $6,000 as collateral security when it was only incumbent on us to send $5,000, the arrangement being that you should have 10 per cent. margin. It is, therefore, not necessary for us to deposit as collateral security more than $5,000 bonds in this transaction, the overplus of collateral on the first transaction being the exact amount required to furnish the 10 per cent. margin on the second transaction; we have therefore sent you under separate cover the following:

$2,000 Saratoga Gas & Electric Light Co., 1st 6 per cents.
1,000 Kansas Water & Light Co., 1st 6 per cents.
1,000 United Terminal R'y Co., 1st 6 per cents.

Also the two £500 debentures and the statement of account showing amount due.

257 Trusting that this explanation will be satisfactory, we beg to remain,

Yours faithfully,

COFFIN & STANTON, LIMITED,
By WALTER STANTON.

Coffin & Stanton, Limited, 43 Threadneedle street.

LONDON, E. C., *July* 20, 189-.

Messrs. Wade, Bilbrough, Booth & Co., 8 Piccadilly, Bradford.

DEAR SIRS: We are today in receipt of a letter from the Debenture Guarantee & Assurance Co., in which they express regret that more of the 4½ per cent. debentures have not been placed as we had virtually assured them that the entire amount of series Z would be placed within a year.

In order to make this transaction more satisfactory to them, we make you the following proposition:

If you will take £4,000 of these debentures, we will purchase from you £2,000 of same, upon the understanding that when we dispose of the debentures, you will transfer the insurance policy to the purchaser.

You will note from this proposition that you make the full commission on the £4,000 at once.

Yours faithfully,

COFFIN & STANTON, LIMITED,
(Signed) By WALTER STANTON.

Coffin & Stanton, bankers, New York, London.

258 We offer subject to sale, or advance in price, $360,000 city of Santa Cruz, California, 5 per cent. refunding gold bonds. Dated April 16, 1894. Due as follows: $9,000 April 15, 1895, and $9,000 annually thereafter. Average time to run 20½ years. No option of redemption before maturity. Denomination, $1,000. Coupons annually April 15th. Payable at city treasurer's office, Santa Cruz.

Real valuation	$9,768,600
Assessed valuation	3,907,400
Total debt (this issue)	360,000
Issued to refund bonds for water supply	320,000
Net debt	40,000

Including the suburbs a total population of 11,000 is tributary to the water system. The corporate limits of the city have not been enlarged for many years.

The water plant is a gravity system costing about $370,000.

A legal investment for savings banks in the States of Rhode Island, Pennsylvania, Maryland, and New Hampshire. Price, $101 and interest. Nets nearly 5 per cent.

Under the law governing savings banks investments in the State of Massachusetts, the debt issues for water supply is deducted from

the gross debt on the theory that such property is self-sustaining, and no burden upon the city. In estimating the net indebtedness this rule has been followed:

43094.

First-mortgage 6 per cent. gold bonds of the City Water Company of Santa Cruz, California. Dated 1890. Due 1910. Denomination, $1,000. Coupons May and November ——.

The plant owned by this company was purchased by the
259 city, subject to this bond issue of $130,000. The city paying $270,000 in money over and above the bonds so assumed, hence it will be seen that the outstanding water company bonds are secure beyond question.

Legality of issue has been passed upon by our attorneys in both California and New York.

Santa Cruz, situated on the coast about fifty miles south of San Francisco, is one of the most substantially built and prosperous cities in California. Many of the streets are paved with asphalt. The public and other improvements are of a superior character.

The city has extensive manufacturing and commercial interests, and the surrounding country is of unsurpassed fertility, largely under fruit culture, the actual yield occasionally running as high as $750 to $1,000 per acre.

The prevailing nationalities are American and English, the latter attracted to the city by its unrivaled climate and social advantages.

Water is a necessity in that climate, and is largely used for irrigation, as well as for domestic purposes and fire protection. Under irrigation a failure of crop is unknown.

BALL, WOOD & OAKLEY,
Attorneys-at-law, Chicago.

MARCH 22, 1893.

City Water Company of Santa Cruz.

We hereby certify that we have examined the following documents relating to the issue of four hundred thousand six per cent. gold bonds, of the City Water Company of Santa Cruz, California.

1. Certified copy of the articles of incorporation of said company, dated September 26, 1889, and accompanying certificates of filing.

260 2. Certified copy of laws adopted October 28, 1889.

3. Certified copy of proceedings to create bonded indebtedness. Certified copies of three several ordinances of the city of Santa Cruz, California.

No. 188 October 28, 1889, authorizing the firm of Coffin & Stanton to erect and operate water works.

No. 192 November 20, 1889, authorizing city to convey to City Water Company of Santa Cruz its water and riparian privileges in Laguna creek.

No. 219 June 2, 1890, authorizing the substitution of Holland Trust Company as trustee.

5. Copy of deed of city of Santa Cruz, California, to City Water Company of Santa Cruz, of its water and riparian privileges in Laguna creek, and of its rights of way, etc.

6. Certified copy of assignment of franchise. No. 188, *supra*, by Coffin & Stanton, to City Water Company of Santa Cruz.

7. Original records of City Water Company of Santa Cruz, showing resolutions of stockholders and directors, authorizing execution of deed of trust and bonds, and of the delivery of them.

8. Certified copy of deed of trust, dated May 1, 1890, City Water Company of Santa Cruz to Holland Trust Company of New York City.

9. Certificate of Holland Trust Company of bonds now in their possession.

10. Report on title of rights of way, riparian rights and water privileges by Mr. E. H. Rixford, attorney-at-law, San Francisco, California, dated April 1, 1890.

261 And from such examination we are of the opinion that the City Water Company of Santa Cruz was on May 1, 1890, and ever since has been, a lawfully created corporation under the laws of the State of California; that it has power to borrow money and issue its bonds to evidence the same, and to secure the payment of such bonds by mortgage or deed of trust upon its property; that by original franchise and by the subsequent assignment thereof the said City Water Company of Santa Cruz, was, May 1, 1890, invested with power and authority to erect and maintain its water plant in the city, and to furnish water to the city and the inhabitants thereof, as in said ordinance provided; that the resolutions of the stock holders and directors authorize the execution of bonds to the amount of four hundred thousand dollars, and of the deed of trust to secure the same; that the bond and deed of trust are in due form of law, to create a lien upon the property of the company; that the deed of trust has been filed for record and recorded.

From the opinion of title of Mr. T. H. Rixford, and from unauthenticated copies of deeds we are of the opinion that riparian and water rights from the source of supply, Laguna creek, were on said first day of May, 1890, vested in said company and are covered by said deed of trust.

We further find that of said four hundred bonds two hundred and seventy are held by the Holland Trust Company to secure a like number and amount of the bonds of said city of Santa Cruz, and that twenty-seven other of said bonds have been canceled, and that the residue of said four hundred bonds—that is to say, one hundred and three each of the par value of one thousand

262 dollars—are outstanding and are valid obligations and secured by the deed of trust hereinbefore recited.

Very respectfully, CHAS. B. WOOD.

Coffin & Stanton, Limited, 43 Threadneedle Street.

LONDON, E. C., 11*th Sept.*, 1893.

American Debenture Company.

Messrs. Wade, Bilbrough, Booth & Co., 8 Piccadilly, Bradford.

DEAR SIRS: We have just discovered that the Consolidated Gas & Electric Light Co. securities held by our New York people are the extension mortgage bonds—not the firsts as we had supposed. We therefore beg to again ask if you kindly allow us to withdraw $2,000 Consolidated Gas & Electric Light Co., and $1,000 Saratoga Gas & Electric Light Co. bonds, we substituting in place thereof $3,000 first-mortgage 6 per cent. gold bonds of the City Water Co. of Santa Cruz, California. These bonds are an exceptionally good water bond, and the last sale in England was at 101 and accrued interest.

We inclose you herewith circular describing the bonds; also a report of Mr. C. Wood, who was appointed by the Mortgage Insurance Co. of London to report upon this water Co., and which report was considered sufficiently satisfactory for them to accept the bonds.

The City Water Co. of Santa Cruz was organized for the purpose of constructing the water works referred to. It issued its
263 bonds amounting to $400,000. The works were afterward purchased by the city; the city paying for same $270,000, cancelling a like amount of the first-mortgage 6 per cents, and assuming the remaining $130,000 first-mortgage 6 per cents, as their own liability, of which they have since retired $27,000, thus leaving but $103,000 first-mortgage 6 per cent. bonds outstanding upon the water works for which the city paid $400,000.

We have no details of the earnings and expenditures of this company, as the bonds are practically a municipal bond, the interest being paid by the city.

We have but five of these bonds. Our New York house holds none.

The population supplied by the water works is about 8,000.

We would like you to return to us the report by Mr. Wood, as it is an original document. But we will be pleased to make a copy for you if you desire it.

Trusting you will allow us to withdraw the bonds referred to, we beg to remain,

Yours faithfully, COFFIN & STANTON, LIMITED.
F. H. BURR, *Secretary.*

SEPT. 12TH, 1893.

American Debenture Company.

DEAR SIRS: We are in receipt of your letter of 11th instant, with circular and report of Mr. Wood relating to the bonds of the City Water Company of Santa Cruz, offered in exchange for the
264 bonds of the Saratoga Gas & Electric Light Co., and the Consolidated Gas & Electric Light Co., which you wish to with-

draw. As you are already aware we make a practice of submitting these applications to our board, and we shall not be able to give you a reply before Monday next.

In the meantime please advise us of the date and amount of the sale in England at 101 and accrued interest mentioned in your letter.

Yours faithfully,

WADE, BILBROUGH, BOOTH & CO.

Messrs. Coffin & Stanton, Limited, 43 Threadneedle street, London, E. C.

Coffin & Stanton, Limited, *32* Threadneedle street.

LONDON, E. C., *13th Sept.*, 1893.

American Debenture Company.

Messrs. Wade, Bilbrough, Booth & Co., 8 Piccadilly, Bradford.

DEAR SIRS: We thank you for your letter of the 12th inst., relating to the City Water Co. of Santa Cruz bonds. The last few sales of these bonds in England are as follows:

Jan. 4, 1893. $5,000 at 101 and accrued interest.
Feb. 2, 1893. $4,000 at 101 " " "
May 1, 1893. $3,000 at 101 " " "

Yours faithfully, COFFIN & STANTON, LIMITED.
F. H. BURR, *Secretary.*

265 SEPT. 18TH.

DEAR SIRS: Our board has sanctioned the exchange of bonds desired by your letter of the 11th inst., and if you will send us the three Santa Cruz bonds we shall be prepared to forward two Consolidated Gas & Electric Light Co.'s bonds and one Saratoga bond in exchange. Please also send a cheque for the substitution fee.

Yours faithfully,

WADE, BILBROUGH, BOOTH & CO.

Messrs. Coffin & Stanton, Limited, 43 Threadneedle street, London, E. C.

Coffin & Stanton, Limited, 43 Threadneedle Street.

LONDON, E. C., *Sept.* 19, 1893.

Messrs. Wade, Bilbrough, Booth & Co., 8 Piccadilly, Bradford.

American Debenture Company.

DEAR SIRS: We beg to acknowledge the receipt of your favor of the 18th inst., and desire to thank your board for their courtesy in permitting us to withdraw the $1,000 Saratoga Gas & Electric Light Co. and $2,000 Consolidated Gas & Electric Light Co. bonds. We hand you herewith three $1,000 bonds of the City Water Co. of Santa Cruz, Cal., together with our cheque for £1.10.0 in payment of substitution fee.

266 Upon receipt of these bonds, will you kindly forward us the Saratoga and Consolidated G. & E. L. bonds.

Yours faithfully,

COFFIN & STANTON, LIMITED.
F. H. BURR, *Secretary.*

Registered. SEPT. 20TH.

American Debenture Company.

DEAR SIRS: We are in receipt of your letter of 19th inst., inclosing three $1,000 bonds of the City Water Co. of Santa Cruz, Cal., Nos. 56, 57 and 58, in exchange for which we inclose two $1,000 bonds of the Consolidated Gas & Electric Co. Nos. 119 and 120, and $1,000 bond of the Saratoga Gas & Electric Co., No. 76.

We have also received your cheque for 1.10.0 in payment of substitution fee.

Please acknowledge the receipt of the bonds sent herewith.

Yours faithfully,

WADE, BILBROUGH, BOOTH & CO.

Messrs. Coggin & Stanton, Limited, 43 Threadneedle street, London, E. C.

Coffin & Stanton, Limited, 43 Threadneedle Street, London, E. C.

Messrs. Wade, Bilbrough, Booth & Co., Piccadilly, Bradford.

Debenture Guarantee and Ass'ce Company.

DEAR SIRS: You hold $3,000 City of Santa Cruz Water Co. 6 per cent. bonds as collateral security for the above Co.'s issue of
267 debentures. We would like to withdraw these $3,000 Santa Cruz bonds, giving you in place of same a like amount of the Salt Lake & Ogden Gas & Electric Light Co. first-mortgage 6 per cent. bonds, circular regarding which we inclose herewith; also résumé of the auditor's figures for this company, dated January 1, '94. Can you oblige us in this matter?

We shall be pleased to let you have a full copy of the auditor's balance-sheet of the Salt Lake Co., dated January 1, '94, if you so desire.

Yours faithfully,
(Signed)

F. H. BURR.
M. W.

MAY 11, '94.

Debenture Guarantee & Assurance Company.

DEAR SIRS: We are in receipt of your letter of 10th instant requesting permission to substitute $3,000 Salt Lake & Ogden Gas & Electric Light Co. bonds for the like amount of Santa Cruz Water Company bonds. Our board will not meet again until the 21st

instant, but on that day the matter will be brought before them and their decision communicated to you.

Yours faithfully,

(Signed) WADE, BILBROUGH, BOOTH & CO.
J. E. B.

Messrs. Coffin & Stanton, Limited, 43 Threadneedle street, London, E. C.

MAY 18, '94.

Debenture Guarantee & Assurance Company.

DEAR SIRS: Referring to your letter of the 10th instant,
268 we shall be glad if you will send us by return of post a copy of the last balance-sheet of the "Santa Cruz Water Company" in readiness for our board meeting on Monday; also a full copy of the auditor's balance-sheet (of 1st January, 1894) of Salt Lake and Ogden Company.

Yours faithfully,

(Signed) WADE, BILBROUGH, BOOTH & CO.

43 Threadneedle street, London, E. C., Messrs. Coffin & Stanton, Limited.

Coffin & Stanton, Limited, 43 Threadneedle street.

LONDON, E. C., *19th May*, 1894.

Messrs. Wade, Bilbrough, Booth & Co., Cavendish house, Piccadilly, Bradford.

DEAR SIRS: We beg to acknowledge the receipt of your favor of 18th inst., and inclose you herewith a copy of the audited balance-sheet of the Salt Lake & Ogden Gas & Electric Co., as requested. We are unable to forward you a balance-sheet of the Santa Cruz Co. as the works are operated by the city, and, therefore, no statements whatever are issued.

Yours faithfully,

COFFIN & STANTON, LIMITED.

(Signed) F. H. BURR, *Secretary*.
M. W.

Inclosure.

MAY 22, 1894.

Debenture Guarantee & Assurance Company.

DEAR SIRS: Our board have had your letter of 10th instant, requesting permission to substitute $3,000 Salt Lake & Ogden
269 Gas & Electric Light Co.'s bonds for a like amount of Santa Cruz Water Co.'s bonds, under consideration, and are not disposed to comply unless you can see your way to increase the margin of security. You will probably be aware that we have had

the Salt Lake & Ogden bonds offered on previous occasions, but have preferred to keep out of them.

Yours faithfully,

(Signed) WADE, BILBROUGH, BOOTH & CO.

Messrs. Coffin & Stanton, Limited, 43 Threadneedle street, London, E. C.

Coffin & Stanton, Limited, 43 Threadneedle Street.

LONDON, E. C., 26*th May*, 1894.

Messrs. Wade, Bilbrough, Booth & Co., Piccadilly, Bradford.

Debenture Guarantee & Ass'ce Co.

DEAR SIRS: We beg to acknowledge receipt of your favor of the 22d inst., and note that you are not disposed to accept the Salt Lake bonds in exchange for the Santa Cruz water 6 per cents, unless we can see our way to increase the margin. We regret we are unable to do this, as we have no authority.

Will you permit us to substitute a like amount of the city of Santa Cruz, California, 5 per cent. refunding gold bonds in place of the city of Santa Cruz water 6 per cents? We inclose herewith circular fully describing the municipal bonds, and we can strongly recommend them as a good security.

270 Your early attention to this matter will oblige,

Yours faithfully,

COFFIN & STANTON, LIMITED.

(Signed) F. H. BURR, *Secretary*.

BRADFORD, 28*th May*, 1894.

Debenture Guarantee & Assurance Co.

DEAR SIR-: Your letter of the 26th instant proposing to substitute city of Santa Cruz 5 per cent. bonds for city of Santa Cruz water bonds has been considered at our board meeting this afternoon, when a disposition was evinced to oblige you. Before giving a definite answer, however, we should like some further explanation with respect to the statement in the particulars you have sent intimating that the 5 per cent. bonds are issued to refund bonds for water supply. Does this mean that the 5 per cent. bonds are in substitution for the 6's we already hold, or does it indicate that there are two sources of supply—one owned by the city and the other by the water company?

Yours faithfully,

(Signed) WADE, BILBROUGH, BOOTH & CO.

Messrs. Coffin & Stanton, Limited, 45 Threadneedle street, E. C.

Coffin & Stanton, Limited, 43 Threadneedle street.

LONDON, E. C., 28*th May*, 1894.

Debenture Guarantee & Assurance Co.

Messrs. Wade, Bilbrough, Booth & Co., 8 Piccadilly, Bradford.

DEAR SIRS: We beg to acknowledge the receipt of your
271 favor of the 28th inst., and in reply thereto would state that at the time the water works were built in the city of Santa Cruz, the law authorized the city to issue only about $300,000 bonds for this purpose. As the works cost about $400,000 to build, it was necessary to form a company which should issue its bonds for this $100,000, retaining a lien upon the city's plant for their security. It is these bonds which you now hold. Since the time of the building of the works, the State laws of California have been so changed that the municipality is now able to refund the former municipal bonds (which were payable one-twentieth each year for twenty years) into a new bond payable one-fortieth each year for forty years. And the law has also been so changed that the city is now legally in a position to issue a sufficient number of bonds to provide for the cancellation of the old water company bonds, such as you now hold. There is but one source of supply, and the issue of municipal bonds which we now propose to give you in place of the water company bonds will enable the retirement of the water company bonds, thus leaving the municipal bonds the only lien upon the property.

We believe the securities offered to be in every respect as desirable as those now held by you, and trust you will see your way clear to give us a favorable reply to our request.

Yours faithfully,

COFFIN & STANTON, LIMITED,

(Signed) By CHAS. B. LUDWIN, *Director*.

M. W.

272 MAY 30, 1894.

Debenture Guarantee & Assurance Company.

DEAR SIRS: We are in receipt of your letter of 29th instant, and from the information which it affords we are now disposed to accede to your request to substitute city of Santa Cruz 5 per cent. municipal bonds for City of Santa Cruz Water Company 6 per cent. bonds. We presume you will send us the former bonds, together with a check for the substitution fee, upon receipt of which we shall have pleasure in returning the water bonds.

Yours faithfully,

(Signed) WADE, BILBROUGH, BOOTH & CO.

Messrs. Coffin & Stanton, Limited, 43 Threadneedle street, London, E. C.

Coffin & Stanton, Limited, 43 Threadneedle street.

LONDON, E. C., 31*st May*, 1894.

Debenture Guarantee & Ass'ce Co.

Messrs. Wade, Bilbrough, Booth & Co., Piccadilly, Bradford.

DEAR SIRS: We beg to acknowledge receipt of your favor of the 30th inst., for which please accept our thanks. We have today sent you under separate cover $3,000 of the 5 per cent. municipal bonds of the city of Santa Cruz in exchange for which please forward us a like amount of the Santa Cruz Water Co. bonds.

273 We inclose herewith our cheque for substitution fee, as requested.

Yours faithfully,

COFFIN & STANTON, LIMITED,

(Signed) By CHAS. B. LUDWIG, *Director*.

Inclosure.

J 3–176.
M. W.

Registered.

JUNE 1, 1894.

Debenture Guarantee & Assurance Company.

DEAR SIRS: We are in receipt of your letter of 31st ulto., inclosing $3,000 city of Santa Cruz 5 per cent. municipal bonds, in exchange for which we hand you herewith a like amount of City Water Company of Santa Cruz 6 per cent. bonds (Nos. 56, 57, and 58). Please acknowledge the receipt on the annexed form.

Your cheque for £1 10 0d. substitution fee is also to hand, formal receipt for which is inclosed.

Yours faithfully,

(Signed) WADE, BILBROUGH, BOOTH & CO.

Messrs. Coffin & Stanton, Limited, 43 Threadneedle street, London, E. C.

Coffin & Stanton, Limited, 43 Threadneedle street.

LONDON, E. C., 2*d June*, 1894.

Debenture Guarantee & Ass'ce Co.

Messrs. Wade, Bilbrough, Booth & Co., Cavendish house, Bradford.

DEAR SIRS: We beg to acknowledge the receipt of your
274 favor of the 1st inst., inclosing $3,000 of the City Company of Santa Cruz 6 per cent. bonds; for which please accept our thanks.

Fort Madison Gas. Co.

We acknowledge safe receipt of £250 Fort Madison Gas Company June 1st coupons, for which also please accept our thanks.

Yours faithfully,

COFFIN & STANTON, LIMITED.

(Signed) F. H. BURR.

19—248

Nothing contained in the foregoing stipulation shall be deemed to be a waiver of any objection by either party hereto that the facts herein stipulated are incompetent, immaterial and irrelevant to the issues in the case, and any objections thereto on such grounds may be urged by either party at any time without specifically stating such objections.

Any and all errors in this stipulation may be corrected at the suggestion of either party and by reference to the original records of the defendant, or depositions on file in the case, or any further documents or testimony admitted in evidence.

CHICKERING, THOMAS & GREGORY,
Attorneys for Plaintiff.

LINDSAY & CASSIN AND
JAMES G. MAGUIRE, *Attorneys for Defendant.*

ROBERT EFFEY, a witness on behalf of plaintiff, testified as follows:

That the name "Robert Effey," signed to a document exhibited to him, was in his handwriting.

275 The document was then offered, received and read in evidence on behalf of the plaintiff, and marked "Plaintiff's Exhibit 1," which said document reads as follows:

"STATE OF CALIFORNIA, } ss:
"*County of Santa Cruz,* }

"OFFICE OF THE CITY CLERK OF THE CITY OF SANTA CRUZ.

"I, O. J. Lincoln, city clerk of the city of Santa Cruz, do hereby certify that, at a charter election held on the ninth day of April, 1894, Robert Effey was elected mayor in and for — ward of said city of Santa Cruz.

"Witness my hand and the seal of said city this eleventh day of April, 1894.

"[SEAL.] O. J. LINCOLN, *City Clerk.*

"STATE OF CALIFORNIA, } ss:
"*County of Santa Cruz,* }

"I, Robert Effey, do solemnly swear that I will support the Constitution of the United States and the constitution of the State of California, and that I will faithfully discharge the duties of the office of mayor of the city of Santa Cruz, according to the best of my ability. So help me God.

"ROBERT EFFEY.

"Subscribed and sworn to before me this sixteenth day of April, A. D. 1894.

"O. J. LINCOLN, *City Clerk.*

"[SEAL.]"

276 (The witness then continued:) I suppose the date on which I took the oath of office is shown on the certificate. It is my

best recollection that I took the oath of office either late in the forenoon, or early in the afternoon, of said day. I am sure that it was after 11 o'clock a. m. I signed that document in the council chamber of the city, in the city hall at Santa Cruz. That council chamber is usually open for business at 8 o'clock or 9 o'clock. It was some two or three hours after the opening of the city offices for the ordinary business of the municipality when I took that oath of office.

(By Mr. THOMAS:)

Q. Mr. Effey, did you assume the duties of the office of mayor on April 16, 1894?

Mr. MAGUIRE: We object to the question as irrelevant, immaterial, and incompetent.

The COURT: Is there any bond necessary to be given?

Mr. THOMAS: No, sir; no bond is needed upon the qualification of the mayor.

The COURT: The qualification is made when the oath is taken?

Mr. THOMAS: Yes. The object of the question, and of a number of questions that will follow, to this and other witnesses, is this: We desire to prove, not only that Mr. Effey did not assume the duties of his office, or attempt to perform any of the duties of the mayor of the city until the first Monday in May, 1894, but that Mr. Jeter, who signed the bonds as mayor on April 16th, continued to perform the duties of mayor, and presided over the meetings of the common council, two of them at least, between this date and the sixteenth of May, the date when Mr. Effey assumed the du-
277 ties of mayor. We propose to go further and show that has been the uniform custom of the municipality of Santa Cruz, going back for a period of over ten years. If your honor will permit me to call your attention to the dates fixed in the statute which incorporated the city of Santa Cruz, your honor will see, any purchaser of bonds, according to our theory of the case, had a right to assume, from the transactions which had been the universal practice there for years, that the mayor and council elect did not take their offices until the first Monday in May following their election. The statute of 1876, which incorporated the city of Santa Cruz, provided that the charter election should be held on the second Tuesday in April.

Thereupon the court overruled the objection; to which ruling defendant then and there duly excepted. The witness thereupon answered: "No, sir."

(Witness then continuing, testified as follows:) In 1894 I first commenced the performance of any of the duties of mayor of the defendant on May 7th. Up to that date, Mr. William T. Jeter had assumed to act and perform the duties of mayor.

Between April 16, 1894, and May 7, 1894, when I first performed any duties as mayor, the outgoing board of common councilmen acted as councilmen, not the board elected at the time I was elected. The board elected with me first assumed the duties of their office as

members of the council of the city of Santa Cruz on May 7, 1894, the same date when I assumed my office as mayor.

O. J. LINCOLN, a witness called on behalf of plaintiff, testified as follows:

278 (By Mr. THOMAS:)

Q. Mr. Lincoln, who performed the duties of the office of mayor of the city of Santa Cruz between April 16, 1894, and May 7, 1894?

To which question defendant then and there objected upon the ground that the same was irrelevant, immaterial and incompetent. The court overruled the objection; to which ruling defendant then and there duly excepted, and now assigns said ruling as error. The witness thereupon answered: "Mr. Jeter."

Mr. Thomas here offered in evidence a resolution incorporated in a purported record of a meeting of the city council of the city of Santa Cruz, held on the twenty-third day of April, 1894, ordering and directing that the bonds here in question be delivered to Messrs. Coffin & Stanton, the minutes of said meeting showing that Mr. William T. Jeter acted as mayor, and members of the old city council, whose successors were elected on the ninth day of April, 1894, and qualified between said ninth day of April and the sixteenth day of April, 1894, acted as members of the city council.

Defendant thereupon objected to said resolution as irrelevant, immaterial and incompetent, and specified, in support of said objection, that the resolution appeared from the face of the minutes to have been adopted by persons who are not legally entitled to the offices, the functions of which they exercised at the time. The court overruled the objection; to which ruling defendant then and there duly excepted. The resolution was thereupon admitted in evidence.

279 (The witness further testified:) That he performed the duties of city clerk during that period; that he was re-elected city clerk at the charter election of 1894; that from April 16, to May 7, 1894, there were seven meetings of the common council, not including the two meetings of the common council on the seventh of May, 1894, of which two meetings one was presided over by William T. Jeter, and the second by Robert Effey; that he (the witness) signed all the bonds which form the subject of controversy in this action, as city clerk of Santa Cruz; that he signed such bonds during the week prior to the sixteenth day of April, 1894; that he did not know whether said bonds were signed by William T. Jeter before April 16, 1894; that when said bonds went out of witness's possession into Mr Jeter's possession, they were unsigned by Mr. Jeter; that witness delivered said bonds to Mr. Jeter some time during the week prior to the sixteenth of April, 1894; that the mayor and common council of the city of Santa Cruz (the old board,) on the twenty-third day of April, 1894, ordered said bonds to be delivered to Coffin & Stanton, and that on the twenty-fourth day of

April, 1894, he delivered the bonds in accordance with that order to Walter Stanton, of the firm of Coffin & Stanton.

On cross-examination the witness stated as follows:

"That he received the bonds back from Jeter on the morning of the twenty-fourth day of April, 1894, and that they then bore the signature of William T. Jeter as mayor."

WILLIAM T. JETER, a witness on behalf of plaintiff, testified:

That it was he who signed, as mayor of the defendant, the
280 bonds which are in controversy in this action; that he signed them on three several days, not consecutively; that the bonds were brought to him to sign, and were in his possession several days before he signed any of them, and that then he commenced to sign them, and did sign them, each, and after 3 o'clock; that said facts are fixed positively in his mind by the fact that the bank closed at 3, and that they were in the bank, and that the last signing was on the afternoon of the sixteenth day of April, 1894, after 3 o'clock; that the bonds, when he signed them, were in the Bank of Santa Cruz County, of which said bank witness at the time was an officer; that he did not know how many of the bonds he signed on the afternoon of the sixteenth of April, 1894; that said bonds were at the bank a number of days before he signed any of them, left there by the clerk; that witness was exceedingly busy at the time, and took up the matter only after banking hours, and deferred it as long as he could, so as to have them ready the night that the bids were to be received; that the bids were to be received on the evening of the sixteenth of April, 1894; that said bonds were at the bank several days before witness signed any of them—three or four, at least; that there were three days actually occupied in the signing of the bonds by witness—that is, a portion of three days—each time after 3 o'clock in the afternoon; that he did not know how many bonds he signed on the afternoon of the sixteenth.

(By Mr. THOMAS:)

Q. Mr. Jeter, who performed the duties of the office of mayor of Santa Cruz from April 16 to May 7, 1894?

Mr. MAGUIRE: We object to the question as immaterial, irrelevant and incompetent.

281 The court overruled the objection; to which ruling defendant then and there duly excepted. The witness thereupon answered the question as follows: "A. I acted as mayor until evening of the seventh of May, as well as I recollect."

The witness was thereupon asked the following question by plaintiff's attorney:

Q. I want to ask you, Mr. Jeter, if Mr. Robert Effey, the mayor-elect, attempted in any way, to your knowledge, to perform the duties of mayor of Santa Cruz prior to May 7, 1894?

To which question defendant's counsel objected upon the grounds that the same was irrelevant, immaterial, and incompetent. The court overruled the objection; to which ruling defendant then and

there duly excepted. The witness thereupon answered, "Not to my knowledge."

The COURT: I shall find as a fact that he was in a position to know, unless there should be some counter-evidence.

The witness was then asked the following question by plaintiff's attorney:

Q. Between the sixteenth day of April and the seventh of May, did any person question your right to act as mayor of the city of Santa Cruz?

To which question defendant's counsel then and there objected, on the grounds that the same was irrelvant, immaterial, and incompetent. The court overruled the objection; to which ruling defendant then and there duly excepted. The witness thereupon answered, "Not that I have any knowledge of."

282 The witness further testified: That he was present at and presided over all meetings of the common council of the city of Santa Cruz held between April 16, 1894, and May 7, 1894.

It was conceded by counsel that there were seven of such meetings of the old or outgoing common council.

On cross-examination the witness stated as follows:

That he did not know at that time the oath of office of Robert Effey, as mayor of the city of Santa Cruz, was filed; that the time to which he referred in his direct examination as the evening on which bids were to be received was the evening of the sixteenth of April, 1894, at which time the bids were to be opened, if any were received; that it was his best recollection that he signed all the bonds before the meeting of the sixteenth of April, 1894, held at 7.30 p. m. of said day; that it was his best recollection that the last of the bonds were signed after 3 o'clock in the afternoon of the sixteenth day of April, 1894; that the greater number of the bonds were signed at the last sitting—that is, the day that witness finished signing them; that he did not sign the bonds in any regular or numerical order from which he would be able to tell what bonds were signed on the evening of the sixteenth of April; that he had no recollection whatever whether they were arranged consecutively; that he took no notice and kept no note of the numbers of the bonds; that he signed none of the bonds on Sunday, the fifteenth day of April, 1894.

On redirect examination the witness stated:

283 That he endeavored to have all the bonds signed and ready for the evening of the sixteenth of April, 1894; that is, for the meeting on the evening of the sixteenth of April, 1894, which would be at 7.30 o'clock; that the Bank of Santa Cruz County at that time kept open until 3 o'clock in the afternoon of every week day, including Saturday; that witness was present at said bank during the times concerning which he has testified.

Plaintiff then rested.

There was offered, received, and read in evidence on behalf of the defendant, and marked "Defendant's Exhibit A," a contract entered into by and between the city of Santa Cruz and William Edward Coffin, Walter Stanton, Charles Hervey Jackson, and Charles F. Street, dated the sixteenth day of September, 1889, which reads as follows:

DEFENDANT'S EXHIBIT "A."

Contract—City of Santa Cruz and Coffin & Stanton.

"Contract entered into the sixteenth day of September, 1889, for the purchase of water works, by and between the city of Santa Cruz, a municipal corporation existing under the laws of the State of California, party of the first part, and William Edward Coffin, Walter Stanton, Charles Hervey Jackson, Charles F. Street, all of the city, county, and State of New York, and doing business under the firm name of Coffin & Stanton, the parties of the second part, witnesseth:

"Whereas, the city of Santa Cruz desires to acquire a water-works system for said city; and

"Whereas, Coffin & Stanton desire to furnish such a water-works system,

284 "Now, therefore, for and in consideration of the sum of one dollar, paid in hand this sixteenth day of September, 1889, to said city of Santa Cruz, by said Coffin & Stanton, the receipt of which is hereby duly acknowledged, and other valuable considerations, the following contract has been entered into:

"The said city of Santa Cruz agrees to grant to said Coffin & Stanton a franchise for the construction of water works in said city of Santa Cruz, and said Coffin & Stanton agree to construct, or cause to be constructed, a water-works system which shall in every way be in conformity with the specifications of the engineer employed by said city, which specifications are embodied in the report by said engineer under date of July 30, 1889; which report is hereby referred to and made a part hereof; the works to be constructed subject only to such modifications as may hereafter be mutually agreed upon, or are contained in this contract. And said city of Santa Cruz agrees to purchase said water works when the same are completed, and to pay for the same the sum of three hundred and twenty thousand dollors, as hereinafter — forth.

"And, in order to carry out the foregoing provisions of this contract, said Coffin & Stanton shall have the privilege of assigning to whomsoever they may elect, any or all of the rights herein granted.

"And said Coffin & Stanton shall organize, or caused to be organized, a corporation entitled 'City Water Company of Santa Cruz,' to which corporation shall be assigned the franchise hereinbefore mentioned.

285 "And said water company shall cause to be issued, in due and legal form, a first mortgage upon all its properties, rights, titles, and franchises, now owner of hereafter to be acquired, for an amount not to exceed four hundred thousand dollars, said bonds to

bear interest at a rate not to exceed six per cent, and to mature in not more than thirty years; and said bonds shall be dated as soon as practicable after the incorporation of said company.

"And said water company shall issue to said Coffin & Stanton at various times during the progress of the work of construction, a sufficient number of said first-mortgage bonds, as shall be required to pay for the construction of said water works, said Coffin & Stanton agreeing to make all necessary cash advances.

"It is understood, however, that said water company shall not, at any time, issue bonds in excess of three hundred and twenty thousand dollars, except as shall be hereinafter provided, to wit:

"That in the event of any changes or additions to said water-works system, as described in said report herein referred to, and then said water company shall have the right to issue a sufficient number of said first-mortgage bonds at ninety cents on the dollar to pay for such changes and additions; and said water company shall also have the right to issue bonds at a price not below ninety cents on the dollar, to pay the interest on any of the outstanding bonds of said water company, except such outstanding bonds as are held in escrow, hereinafter referred to.

286 "And when said Coffin & Stanton shall have received all of said three hundred and twenty thousand dollar bonds, and when said water company shall have completed said water works, then said Coffin & Stanton shall deposit with the American Loan and Trust Company, of New York, or such other trust company as may be agreed upon by the parties hereto, two hundred and seventy thousand dollars of said bonds, which shall be held in trust by said trust company to secure a like amount, viz., two hundred and seventy thousand dollars five per cent bonds of said city of Santa Cruz, which said city has heretofore sold to said Coffin & Stanton. And the deed of trust or escrow under which said water company bonds shall be deposited, shall provide that when any of the installments of said city of Santa Cruz five per cent bonds shall be paid by said city, then said trust company shall cancel a similar amount of the first-mortgage bonds, and continue so to do until all of said water company's bonds, deposited with them, are canceled.

"And, if said city of Santa Cruz shall default in the payment of the principal, or any of the installments thereof, or any of the interest coupons of said city five per cent bonds, and shall continue in such default for a period of six months, then said trust company shall be authorized to deliver said first-mortgage water company bonds to the holders of said five per cent city bonds, and provisions to this effect shall be contained in said deed of trust or escrow.

"And when said water company shall have fully completed
287 said water works, then said water company shall convey absolutely to said city of Santa Cruz all its property, rights, titles and franchises, to have and to hold forever, subject only to the mortgage and to the deed of trust or escrow hereinbefore mentioned.

"And said city of Santa Cruz agrees to set aside from the gross revenue derived from said water works an amount sufficient to pay the interest on said first-mortgage bonds outstanding, except those

held in escrow, and, after five years, an amount sufficient to form a sinking fund for the redemption of said outstanding bonds at maturity, except those so held in escrow. And said water company shall commence operations on the construction of said water works as soon as practicable, and shall have the whole completed within one year of such commencement; provided, however, that neither said water company nor said Coffin & Stanton shall be held in any way responsible for delays which are unavoidable or beyond their control; provided, also that said city of Santa Cruz shall convey to said water company clear and unincumbered rights to at least three-quarters of the riparian rights to Laguna creek, the proposed source of supply for said water works, or to at least three-quarters of such water.

"Also a clear right of way throughout the entire system for the laying of all necessary pipes or mains, and also clear title to all the lands necessary for reservoir sites, or to such other lands as may be found necessary for the effective operation of said water works, all of which said transfers or rights of water, rights of way, and reservoir sites, shall be subject to the legal and equitable rights of
288 said city to the performance of this contract, according to its true meaning and intent.

"And said water company shall not be called upon to begin work until such properties shall have been conveyed to said water company, and until the title to the same shall have been examined and approved by the counsel of said water company. And said Coffin and Stanton shall hold themselves personally and individually liable for any damages which may accrue to said city by the failure of said water company to construct said water works and convey the property of said water company to said city of Santa Cruz, as hereinbefore set forth. And said Coffin and Stanton do hereby guarantee the performance of all the acts of said water company herein specified. And it is hereby mutually agreed and made a part of this contract, that in the event of the failure of said Coffin and Stanton or said water company to perform their part of this contract, then said city of Santa Cruz shall be entitled to collect from said Coffin and Stanton the sum of fifty thousand dollars as liquidated damages, which sum actually represents the loss to said city of Santa Cruz by the failure of said Coffin and Stanton, or said water company, to perform their part of this contract.

"And said city of Santa Cruz agrees to enter into any further contracts or agreements with said Coffin and Stanton, or said water company, which may be necessary, effectually to carry out the spirit and intent of this contract.

289 "In witness whereof, the respective parties to these presents have hereunto set their hands and seals the day and year first hereinabove written.

"CITY OF SANTA CRUZ,
"By G. BOWMAN, *Mayor.*
"COFFIN AND STANTON.

"Attest: O. J. LINCOLN, *City Clerk.*

"(Endorsed): Filed September 16, 1889. O. J. Lincoln, city clerk."

There was then offered, read, and received in evidence on the part of the defendant, and marked "Defendant's Exhibit B," a contract of the city of Santa Cruz for the sale of $270,000 five per cent. bonds, which reads as follows:

DEFENDANT'S EXHIBIT "B."

Memorandum as to Sale of Bonds.

"Memorandum of agreement in the matter of the sale of two hundred and seventy thousand dollars five per cent. bonds of the city of Santa Cruz and in the matter of the purchase of water works by said city of Santa Cruz.

"Whereas, Coffin and Stanton have purchased two hundred and seventy thousand dollars five per cent. bonds of the city of Santa Cruz, and have entered into an agreement under date of the sixteenth of September, 1889, with the city of Santa Cruz, for the sale to said city of certain water works named therein; and

"Whereas, it is desired that the proceeds of the sale of said
290 bonds shall be used solely for the purpose of said works or the redemption of said bonds.

"Now, therefore, it is agreed between said city of Santa Cruz and the said Coffin and Stanton, that said city shall deposit with said Coffin and Stanton the sum of two hundred and forty-five thousand dollars of said proceeds, which sum shall be placed to the credit of said city of Santa Cruz on the books of said Coffin and Stanton, for the use of City Water Company of Santa Cruz, referred to in said contract of September 16, said Coffin and Stanton agreeing to use said fund to carry out the contract hereinbefore mentioned; or, in the event of the failure of said city to acquire said water works in accordance with said contract, then said fund shall be applied by said Coffin and Stanton to the retirement and redemption of the aforementioned two hundred and seventy thousand dollars five per cent. bonds of said city of Santa Cruz, and for the repayment to said city of any payments it may have made on said bonds; or, said Coffin and Stanton and the individual members of said firm, shall be personally liable for the full amount.

"And it is hereby mutually agreed and made a part of this contract, that in the event of the failure of said Coffin and Stanton to perform their part of this contract, then said city of Santa Cruz shall be entitled to collect the sum of three hundred thousand dollars as liquidated damages from the said firm of Coffin and Stanton, or from any or all of the individual members thereof, namely, William Edward Coffin, Walter Stanton, Charles Hervey Jackson, and Charles F. Street, all of the city and county and State of
291 New York, the aforementioned sum of three hundred thousand dollars actually representing the loss to said city of

Santa Cruz from the failure of said Coffin and Stanton to perform this part of their contract.

"And it is further agreed that when the contracts for the construction of said water works are awarded, if they shall be awarded by said water company, that said Coffin and Stanton shall secure from such contractors good and sufficient bonds in the amount of one hundred and fifty thousand dollars, which bonds shall be assigned and delivered to said city of Santa Cruz as additional security for the fulfillment of this agreement and of the contracts hereinbefore referred to.

"In witness whereof, the respective parties to these presents have hereunto set their hands and seals this the twenty-third day of September, 1889.

"G. BOWMAN, [SEAL.]
"*Mayor of Santa Cruz.*
"COFFIN AND STANTON. [SEAL.]

"Signed, sealed, and delivered in the presence of—
"O. J. LINCOLN, *City Clerk.*

"(Endorsed:) Filed September 23, 1889. O. J. Lincoln, city clerk."

DEFENDANT'S EXHIBIT "C."

Trust Deed.

The defendant then offered and read in evidence a trust deed or mortgage, executed by the City Water Company of Santa Cruz, a corporation, to the Holland Trust Company, of New York, and dated May 1, 1890, which said trust deed or mortgage was marked "Defendant's Exhibit C," and reads as follows:

292 "This indenture, made this first day of May, in the year of our Lord one thousand eight hundred and ninety, between the City Water Company of Santa Cruz, a corporation duly organized and existing under and in pursuance of the laws of the State of California, party of the first part, and the Holland Trust Company, of New York, a corporation duly organized and existing under and in pursuance of the laws of the State of New York, as trustee, hereinafter called the trustee, party of the second part, witnesseth:

"Whereas, the said party of the first part is authorized to construct, maintain, and operate water works in the city of Santa Cruz, State of California, for the purpose of supplying the said city of Santa Cruz and the citizens of said city and the vicinity with water, and also to erect and maintain the necessary buildings, plants, machinery, fixtures, and appurtenances of every sort for supplying the inhabitants of the city and vicinity with water, and for other purposes, and carrying on the business incidental thereto, and the said company is the owner and holder of a grant from said city of Santa Cruz of the franchise and privilege of constructing and operating such water works, and the said company, in virtue of the powers,

rights, and privileges vested in it by virtue of the laws of the State of California and the said grant from the city of Santa Cruz, is now constructing and operating said water works; and

"Whereas, at a meeting of the stockholders of the said party of the first part, held at its place of business in the city and county of San Francisco, State of California, on the twenty-first day of
293 April, A. D. 1890, duly called by its board of directors and notified as required by law, the following resolution was adopted by the vote of the holders of all the shares of the company then issued:

"First. Resolved that for the purpose of procuring means to construct, maintain, extend, and complete the water works of the company, and to pay all its indebtedness, et cetera, it is expedient and necessary for the company to borrow the sum of four hundred thousand dollars and to issue its bonds therefor, and to secure the payment of the same as authorized by law.

"Second. Resolved, that the president be, and he is hereby authorized to negotiate such loans, and for that purpose to make and execute a series of bonds of the company, four hundred in number, and each for the sum of one thousand dollars, and numbered from one to four hundred, all bearing date the first day of May, A. D. 1890, and payable to the Holland Trust Company of New York, trustee, or bearer, on the first day of May, A. D. 1910, or at such times as its sinking fund hereafter to be established shall be able to redeem said bonds, said bonds to be redeemed at par according to number, beginning at the lowest, with interest from this date at the rate of six per cent. per annum, payable semi-annually on the first days of May and November in each year, according to coupons to be attached thereto; both principal and interest to be payable in the city of New York in gold coin of the United States of the present standard of weight and fineness, and also to secure the payment of said bonds and the interest thereon by a pledge of the property and income of this company.

294 "Third. Resolved, that the said bonds shall be substantially in the form following, to wit:

"No. —. $1,000.

"UNITED STATES OF AMERICA, *State of California.*

"*The City Water Company of Santa Cruz Six per Cent. First mortgage Gold Bond.*

"Total issue, $400,000.

"The City Water Company, of Santa Cruz, a corporation of the State of California, hereby acknowledged itself to owe to the Holland Trust Company, of New York, trustee, or bearer, one thousand dollars, which it promises to pay to the bearer hereof at the office of said The Holland Trust Company of New York, in the city of New York, in lawful gold coin of the United States of America, of the present standard of weight and fineness, on the first day of May in the year one thousand nine hundred and ten, except as herein-

after provided, with interest thereon from and after the date hereof, at the rate of six per cent. per annum, payable in like gold coin, semi-annually, at the office of said The Holland Trust Company, on the first days of May and November in each year, upon the surrender of the annexed coupons therefor, until the principal sum shall be fully paid.

This is one of a series of four hundred bonds issued by this company, numbered one to four hundred inclusive, each of which is for the sum of one thousand dollars, all bearing the same date with this bond, and in all respects of the same tenor and effect, and the payment of which, both principal and interest, is secured by
295 the mortgage of said company to said The Holland Trust Company, of New York, trustee, *of even date herewith, on all* the real property, machinery, engines, houses, pumps, wells, reservoirs, stand pipes, mains, and water-plant fixtures of said company, and on all its equipment and other property, real and personal, connected with or appurtenant to said water works, or used or provided for the operation and maintenance thereof, now owned or hereafter acquired, together with all the rights and franchises of said company thereunto appertaining, and said bonds are subject to the provisions of said mortgage executed and delivered to said The Holland Trust Company of New York, and recorded, to which reference is made for the provisions thereof and the full conditions hereof.

Said bonds may be redeemed whenever the sinking fund is sufficient therefor, at par, according to the numbers of said bonds, beginning with the lowest number.

Upon default in the payment of any installment of interest of this bond for sixty days after such installment shall become due and payable, the principal hereof shall thereupon become due and payable, upon the condition and in the manner and with the effect as provided and set forth in the said mortgage or deed of trust. It is agreed between the said City Water Company of Santa Cruz and the holder of this bond that, in case of default in the payment of the principal or interest thereof the said company will waive, and does hereby waive, the benefit of any extension, stay, redemption, or appraisement laws, now existing, or which may hereafter be enacted. This bond shall not become obligatory until the certificate indorsed hereon is duly signed by the trustee.

296 In witness whereof the said The City Water Company of Santa Cruz has caused its corporate seal to be hereunto affixed, and this bond to be subscribed and attested by its president and secretary on this first day of May, in the year eighteen hundred and ninety.

CITY WATER COMPANY OF SANTA CRUZ,
By F. R. KING, *President.*

[Seal of the City Water Company of Santa Cruz.]

Attest: E. H. RIXFORD, *Secretary.*

Form of Coupon.

$30. $30.

On the first day of ——, the City Water Company of Santa Cruz will pay the bearer hereof thirty dollars, at the Holland Trust Company of New York, in the city of New York, being six months' interest on its first-mortgage bond No. —.

F. R. KING, *Pres't.*
E. H. RIXFORD, *Sec'y.*

The interest coupons attached to all of said bonds shall be authenticated and evidenced by the signatures of the president and secretary of the company engraved thereon, which shall be regarded and treated as in all respects, in fact and in law, equivalent to a manual signing thereof.

Fourth. Resolved, That the pledge of the property and income of this company to secure the payment of said bonds and the interest thereon shall be in the form of a mortgage or deed of trust, and to that end this company will make, execute, and deliver to the
297 Holland Trust Company, of New York, trustee, a mortgage deed upon all and singular the franchises, rights of way, and privileges granted to said water works company; all the real estate, houses, pumps, machinery, reservoirs, stand pipes, hydrants, and all mains and distributing pipes; also all buildings, plants, machinery, fixtures, and appurtenances and privileges for supplying the citizens of said city of Santa Cruz and the vicinity thereof with water, and all other property now owned, or that may be hereafter acquired by said company, including all rents of hydrants and incomes from water rents, and all revenues or emoluments of said company, delivered from the said water works, by such pertinent description in general and in detail as the president of this company may approve and have incorporated in said mortgage.

Such mortgage, when recorded, shall be a lien upon all the property of this company, including all rights, privileges, franchises, tolls, income, rights of way, leases, grants, liens, equipment, and all the other property, real and personal, of said company, now owned or which may hereafter be acquired, as fully as the same may be set forth therein, and shall be in trust for the equal benefit and security of the holders of said bonds, without reference, priority, or distinction as to lien or otherwise, so that each of them have the same rights, lien, privilege, and security, as though they had all been executed, issued, and delivered simultaneously with the execution and delivery of this mortgage, and said mortgage shall provide that a sinking fund to redeem said bonds shall be established by this company after five years from the date of said mortgage,
298 by paying annually to the said Holland Trust Company of New York, as trustee, two per centum of the amount of bonds secured by said mortgage; and if all said bonds be not issued at said time, then two per centum of the amount then outstanding, and such mortgage may also contain such other terms, provisions, restrictions, and limitations as the president of this company may approve, and have incorporated therein.

Fifth. Resolved, That none of said bonds shall be issued, or be entitled to the benefit of the security of said mortgage, or be in anywise obligatory upon this company as evidence of debt or otherwise, unless or until the said Holland Trust Company of New York, as such trustee, or its successor or successors in such trust, shall have authenticated the same as being so issued and secured, by signing a certificate indorsed thereon, substantially in the form following, to wit:

"The Holland Trust Company of New York hereby certifies that this bond is one of a series of bonds amounting in the aggregate to four hundred thousand dollars, mentioned in the mortgage referred to within.

HOLLAND TRUST COMPANY OF NEW YORK,

By —— ——, *Trustee.*

(Signed) —— ——, *President.*

Sixth. Resolved, That the president and secretary be, and they are hereby authorized and empowered, for and on behalf of this company, to execute each of said bonds by affixing thereto its name and corporate seal, attested by the secretary, and by signing the same as such president, and, when so executed, to deliver the same to said trustee for authentication as aforesaid, and also to make and execute the said mortgage or deed of trust under the corporate name of this company, subscribed by the president, with the corporate seal thereto attached, attested by the secretary, and to acknowledge the same as required by law, and when so acknowledged, the same shall be delivered to said trustee and duly recorded.

And whereas, the board of directors of the said party of the first part, at a meeting held at the office of the company, in said city and county of San Francisco, on the twenty-first day of April, 1890, duly and regularly called, noticed, and convened, did adopt a resolution of like tenor and effect as the foregoing; and

Whereas, the said party of the first part has made and executed its said bonds of even date herewith, for the amounts and of the number, form, denomination, and character prescribed and authorized by the resolutions aforesaid, and hold the same to be authenticated, and disposed of in accordance with the provisions and requisitions of said resolutions, and as authorized by law;

Now, this indenture witnesseth: that the said party of the first part, for the purpose of securing the payment of the principal and interest of the said bonds, when and as the same shall become due and payable, according to the tenor and effect of said bonds so made and executed, and in consideration of the premises, and of the sum of one dollar, lawful money of the United States of America, to it in hand paid by the said party of the second part, at the time of the execution and delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, assigned, set over, released, conveyed, and confirmed, and by these presents does grant, bargain, sell, assign, set over, release, convey, and confirm, unto the said party of the second part, and to its

successor or successors, in the trust hereby created, and to its, his, or their assigns, all and singular, and the entire property of the City Water Company of Santa Cruz, including all rights, power, privileges, and franchises which may have been granted to or conferred upon said party of the first part by the State of California, or which may hereafter be so granted or confirmed, together with all estate and property, real, personal, and mixed, now owned or which may hereafter be acquired by the party of the first part, situated in the city of Santa Cruz and vicinity, and all erections, and buildings, all machinery, engines, reservoirs, pumps, wells, pipes, and other constructions, tools, implements, and fixtures of every kind and nature, made, manufactured, constructed, built, laid, purchased, or in any way acquired, in or about the construction, maintenance, and operation of said water works in the State of California aforesaid; and all income, rents, profits, emoluments, and moneys derived from said water works, including any sum or sums of money which may be paid by the said city of Santa Cruz, and the inhabitants thereof, under and by virtue of any contract with either of them, and including any revenue from any other source whatsoever, or which may be payable to or collectible by said company under the constitution and laws of the State of California;

To have and to hold the said above-described premises,
301 property, rights, franchises, and appurtenances unto the said trustee, its lawful successor or successors, and assigns forever.

In trust, nevertheless, it being expressly covenanted and agreed between the parties hereto, the said party of the first part covenanting as well for itself as for its successor, successors, or assigns, that the above-described premises, property, rights, franchises, and appurtenances are to be had and holden by the said party of the second part upon and for the trusts, uses, and purposes following, that is to say:

Article first.

For the equal benefit and security of all and every the persons or bodies corporate who shall be, or at any time become, the holders of said bonds, or such of them as shall be issued by the party of the first part without preference, priority, or distinction, as to the lien, or otherwise, of any of the said bonds over the others by reason of priority in the time of issuing the same, and so that each and all of the said bonds issued and to be issued as aforesaid, shall have the same right, lien and privilege under and by virtue of this mortgage, and shall all be equally secured hereby with like effect as if they had all been made, executed, and delivered simultaneously with the delivery hereof.

And it is further covenanted and agreed that the party of the first part, after five years from the date hereof, shall establish a sinking fund for the redemption of the bonds hereby secured, by paying to the trustee annually a sum equal to two per centum of the par value of said bonds, or, if all said bonds have not been issued, two
302 per centum of the amount then outstanding, and that said bonds shall be redeemed thereafter at the option of the said

party of the first party as fast as the amount of said sinking fund is sufficient therefor, and at par, according to their number, beginning with the lowest number.

Article second.

And whereas, it was and is the intention that the gross income, revenue, and rentals to be derived and received under any ordinance or contract of or with the city of Santa Cruz, or other municipal corporation, or so much thereof as may be sufficient to pay the interest upon outstanding bonds secured hereby, and to establish the sinking fund hereinafter provided for, to be applied to the payment of such interest and the establishment of said fund, it is agreed by the said party of the first part that said gross income, revenue and rentals so derived, or so much thereof as may be required for the aforesaid purposes, be paid directly to the said party of the second part; and the said party of the first part does now hereby grant, convey, assign, transfer, and set over unto said party of the second part, its successor or successors, its, his, or their assigns, such and so much of said gross income, revenue, and rentals aforesaid to be used and applied in the payment of said interest and the establishment of said sinking fund, and with full power and authority hereby vested in said trustee and in its own name or otherwise, to demand, sue for, recover, collect, and receive the same, and by proper receipts in its own name, or otherwise, to discharge
303 and acquit the said city and other municipal corporations from all liability, claim, or demand, to the extent of the payment made to it from time to time.

Article third.

Until default shall be made by the party of the first part in the payment of the principal or interest of the said bonds, or any of them, according to the tenor and effect of said bonds and of this mortgage, and on the days, times, and place mentioned therein respectively, without further delay, or until default be made by the party of the first part in respect to some act, or thing, covenant, or agreement in any of the said bonds, or herein, required to be kept and performed, the party of the first part shall be permitted to possess, manage, operate, use, and enjoy, all and singular said property, with the appurtenances thereto, hereinbefore described.

Article fourth.

If the party of the first part, its successor, successors, or assigns, shall, at any time hereafter, after demand made make default, or refuse, neglect, or omit for any period exceeding sixty days, to pay the semi-annual interest on the bonds intended to be hereby secured, or any of them, or shall after demand made, make default, refuse, neglect, or omit for any period after the maturity thereof, to pay the principal sum of each and all of the said bonds, or shall suffer or allow any lawful taxes or charges to fall in arrears, whereby the security of this mortgage may be impaired, or shall refuse or fail to

keep or perform any of the covenants and stipulations contained herein, or in the bonds secured, or intended to be secured
304 hereby, and on its part to be kept and performed, then, and in either of such events, the party of the second part may, upon the written request of the holders of one-third in amount of the bonds secured hereby and then outstanding, and upon receiving satisfactory security and indemnity against all costs, expenses, and liabilities to be by the party of the second part incurred, and not otherwise, forthwith demand and with such force as may be necessary, enter upon, take, and maintain possession of all and singular the water works, and all the estate, premises, rights, contracts, and franchises hereby conveyed and mortgaged, or agreed or intended so to be, and as the attorney-in-fact or agent of the party of the first part, by its agents and substitutes, duly constituted, or by its managers, superintendents, receivers, or servants, have, hold, use, manage, operate, and enjoy the same, and each and every part thereof, to as full an extent as the said party of the first part might lawfully do, making from time to time all needful and proper repairs, alterations, and additions, and receiving all tolls, income, and revenue thereof, and after deducting expenses of such use, operation, reasonable repairs, alterations and additions, all lawful taxes and assessments on said water works and property, and the costs or charges of such taking possession, and proper compensation for its services for taking possession and management while in possession, and such sum or sums as may be sufficient to indemnify it against any liability, loss, or damage, for or on account of any matter or thing done by it in good faith and in pursuance of its duties as said trustee; and the party of the second part shall apply the remainder, net income, and revenue therefrom, without giving preference,
305 priority, or distinction to one bond over another, to the payment: First, of the interest due on the bonds then outstanding, hereby secured or intended so to be, in full, if said income and proceeds be sufficient; but, if not, then *pro rata*. Second, of the principal of the said bonds in full, if the said income and proceeds be sufficient; but, if not, then *pro rata*. And if, after such satisfaction, a surplus shall remain to pay over to the said party of the first part, or as any court of competent jurisdiction shall direct.

After such payment, the property to be restored to the party of the first part, subject, however, to the covenants and conditions of this indenture, and to the same extent as if said entry had never been made. Or, the said party of the second part may, after or without entering upon or taking such possession, upon the written request of the holders of a like amount of said bonds then outstanding, and upon like security and indemnity, proceed to sell and dispose of all and singular the said water works, corporate rights, franchises, and premises hereby mortgaged, or agreed or intended so to be, to the highest and best bidder at public auction in the city of New York, or at such place as the said trustee may designate, and at such time, as it shall appoint, having first given notice of the time and place of such sale by advertisement published not less than twice in each week for six weeks in one or more newspapers published

in the city of New York, and in the city of Santa Cruz, State of California, or with power in said trustee to adjourn said sale from time to time, in its discretion, and after so adjourning, to make such sale at the time and place to which the same may be so adjourned,
306 and thereupon to make and deliver to the purchaser or purchasers of the said water works and their appurtenances, and all other, the said property and franchises thereto belonging, good and sufficient deed or deeds in law, in fee-simple, free from all and every of the trusts hereby created, and without obligation on the part of purchaser to inquire into the necessity, expediency, or authority, of or for any such sale, which sale so made as aforesaid shall be a perpetual bar both in law and in equity against the party of the first part, and all persons claiming or to claim the said described premises and property, or any part thereof, or any interest therein, by, from, under, or through the party of the first part, and after deducting from the proceeds of such sale proper allowances for all the expenses thereof, including attorney and counsel fees, and all other expenses, additions, or liabilities which may have been paid or incurred by it for taxes, or assessments on the said water works or the appurtenances, or other property thereto belonging, or any part thereof, as well as reasonable compensation for its own services, it shall be lawful for the trustee, and it shall be *his* duty to apply the residue of the money arising from the said sale, without giving preference, priority, or distinction to one bond over another, to the payment:

First. Of the interest due on said bonds outstanding, secured or intended to be secured hereby, but ratably and without preference or priority; and

Second. Of the principal of said bonds in full, if the said purchase-money, after deducting the expenses and interest above mentioned, be sufficient; but if not, then *pro rata*. And, in the event of there being in the hands of the trustee any portion of the trust
307 estate or the proceeds thereof, after the payment in full of the principal and interest of such bonds, then the trustee shall reconvey, transfer, and pay over such surplus to the party of the first part, its successor, successors, or assigns, for its or their sole use and benefit.

Or, the said trustee may, upon the written request of the holders of a like amount of said bonds, then outstanding, and upon like security and indemnity proceed to protect and enforce the rights of the bondholders under these presents, by a suit or suits in equity or at law, whether for the specific performance of the stipulated covenants and agreements, or any of them, contained herein, on the part of the party of the first part to be kept and performed, or whether in aid of the execution of the power herein granted, or otherwise, as the trustee being advised by counsel learned in the law shall deem most effectual to protect and enforce such rights, it being understood, and it is hereby expressly declared that the rights of entry and of sale hereinbefore granted, are intended as cumulative remedies, additional to all other remedies, allowed by law, and that the same shall not be deemed in any manner whatever to de-

prive the trustee or the beneficiaries under this trust of any legal or equitable remedy by judicial proceedings consistent with the provisions of these presents, according to the true intent and meaning thereof.

Article fifth.

And it is hereby expressly declared and agreed that no holder or holders of a bond, or of any bonds or coupons secured hereby, shall have the right to institute any suit, action, or proceeding
308 in equity or in law, for the foreclosure of this mortgage, or the execution of the trust thereof, or for the appointment of a receiver, or for any other remedy, without first giving thirty days' notice in writing to the trustee of the fact that default has occurred and continued as aforesaid, nor unless one-third in amount of the holders of the bonds then outstanding have made request in writing to the trustee as above provided, and have afforded it a reasonable opportunity to proceed to execute the powers hereinbefore granted, or to institute such action, suit, or proceeding in its own name, and have also offered to it adequate security and indemnity against the costs, expenses, and liabilities to be incurred therein or thereby, and such notification, request, and offer of indemnity are hereby declared to be conditions precedent for the execution of the powers and trust of this mortgage to any action, or cause of action, for the foreclosure of the said mortgage, for the application for the appointment of a receiver, or for any other remedy hereunder, it being understood and intended that no one or more holders of bonds or coupons shall have the right in any manner whatever to affect, disturb, or prejudice the lien of this mortgage, by his or their action, except in the manner herein provided, but that all proceedings in law or equity shall be instituted, had, and maintained for the equal benefit of all holders of said bonds and coupons outstanding.

Article sixth.

And it is further expressly covenanted and agreed that, if the party of the first part, its successor, successors, or assigns,
309 shall, at any time hereafter, after demand made, make default, refuse, neglect, or omit for any period exceeding sixty days, to pay the semi-annual interest on the bonds intended to be hereby secured, or any of them, then the holders of one-third in amount of said bonds may elect to declare the whole principal sum thereof to be due and payable, and may, by an instrument in writing under their hands and seals, instruct the said trustee to declare said principal sum to be due and payable, whereupon the whole principal sum of each and all of said bonds then outstanding, shall forthwith be due and payable, notwithstanding that the time limited therein for the payment thereof may not then have elapsed; and in the event of any sale of the water works hereby mortgaged, or agreed or intended so to be, whether by the trustee or by judicial proceeding, as hereinbefore mentioned, then and in either such case, the whole principal sum of each and all of said bonds then outstanding and intended to be thereby secured, shall forthwith be due

and payable, notwithstanding that the time limited therein for the payment thereof may not have expired; and in no other case and for no other purpose, except as in this article provided, shall the principal sum of any said bonds become due and payable before the date fixed in said bonds for the payment thereof. This provision is expressly declared not to be in the nature of a penalty for a breach of condition, or for the non-payment of interest, but to be a provision which, having regard to the nature of the mortgaged premises, and the impossibility of a sale thereof in parcels, without serious prejudice to all interests, is essentially necessary to effectuate the objects and purposes of the parties hereto.

310 Article seventh.

And it is expressly covenanted and agreed that at the sale of the aforesaid water works, property, franchises, or appurtenances, or of either or any part thereof, hereinbefore conveyed, made by virtue of the power hereinbefore granted, or by judicial authority for the purpose of enforcing the lien of these presents, the party of the second part, its successor or successors, may, at its or their own discretion, and if a majority in interest of the holders of said bonds, by an instrument or concurrent instruments, in writing, signed by them, or their attorney, should instruct them so to do, shall personally or by agent or attorney bid for, and, if the same be attainable, at the price hereinafter mentioned, purchase and acquire the property so offered for sale on behalf of all holders of the bonds secured by this instrument which may then be outstanding, or such of them as shall then signify to said trustee in writing their desire to have such purchase made on their behalf in proportion to the respective interests of such holders in the said bonds and the coupons thereto belonging; provided, however, that nothing herein contained shall authorize the said trustee to bid on behalf of the holders of said bonds a sum exceeding the whole amount of the said bonds then outstanding, with the interest accrued thereon, and the expenses of such sale for the entire property then held upon the trust of this instrument, or an amount reasonably proportionate thereto, for any part of said property. And it is hereby further agreed that the bonds and overdue coupons aforesaid shall be received in payment of the
311 purchase-money of any property sold at such sale, as equivalent to so much of the said purchase-money as would be distributable and payable thereon.

Article eighth.

The party of the first part hereby covenants and agrees with the said trustee, party of the second part, its successor or successors, that it or its successor, successors, or assigns, from time to time, and at all times upon reasonable request, shall and will make, execute, and deliver at its own expenses all such further acts, deeds, conveyances, and assurances in law, for the better assurance unto the said trustee, and its successor or successors in the trust hereby created, upon the trusts and for the purposes herein expressed or intended, all and

singular the water works, property, real, personal, and mixed, rights, privileges, and franchises hereby mortgaged, or conveyed in trust, or intended so to be, now owned or possessed, or which may hereafter be acquired by or vested in the said party of the first part, its successor or successors, or assigns, as by the said party of the second part, or its counsel learned in the law, shall be reasonably advised or required.

Article ninth.

The party of the first part hereby agrees to waive and does hereby irrevocably waive the benefit and advantage of any and all stay, exemption, extension, valuation, and appraisement laws, now existing and which may hereafter be passed by the United States, or any of the States thereof, and all other laws now existing, or which may hereafter be passed by the United States, or any of the States thereof, which may or might prevent, postpone, hinder, or
312 delay the exercise of the right of the party of the second part to enter upon, operate, or sell the mortgaged premises, or any part thereof, or to commence or to continue any action or proceeding in regard thereto, or the exercise of any powers, rights, privileges, and remedies of the party of the second part, or any bondholders under and in accordance with the provisions hereof. The party of the first part hereby expressly covenants and agrees not to claim, set up, or take the benefit or advantage of any law or laws.

Article tenth.

The party of the first part shall and will, from time to time, pay and discharge all taxes, assessments, and all charges lawfully imposed upon the said water works, and other hereby mortgaged premises, or upon any part thereof, and will not suffer any mechanics', laborers', or other statutory liens upon any part of the property hereby conveyed, or intended so to be, the lien or liens of which might or could be held to be prior to the lien hereof, so that the priority of the mortgage may be duly preserved, and shall not and will not suffer any matter or matters, or thing or things whatsoever, whereby the lien of this indenture might, or could, be impaired, until the said bonds hereby secured, with all interest accrued thereon according to the terms hereof, shall be fully paid and satisfied.

Article eleventh.

Upon the filing of a bill in equity, or other commencement of judicial proceedings to enforce the rights of the trustee and
313 of the bondholders under these presents, or to protect any of the property hereby conveyed from sale upon any execution or decree of any court within the State of California, for the payment of money, the said trustee shall be entitled to exercise the right of entry herein conveyed, or to the appointment by any court of competent jurisdiction, of a receiver or receivers of the property hereby mortgaged, and of the earnings, income, revenue, rents, issues, and profits thereof, pending such proceedings with such powers as the court making such appointment shall confer.

Article twelfth.

And it is hereby further covenanted and agreed, and the trusts created by this instrument are accepted upon the express condition that the trustee shall not incur any liability or responsibility whatever in consequence of permitting or suffering the party of the first part to retain or be in possession of the water works, estates, and premises hereby mortgages, or agreed or intended so to be, or any part thereof, and to use and enjoy the same; nor shall the trustee be or become reponsible or liable for any destruction, deterioration, loss, or injury, or damage, which may be done or occur to the said water works and estates hereby mortgaged, or agreed or intended so to be, either by the party of the first part, or its agents or servants, or by any other persons or person whomsoever; nor shall the trustee be in any way responsible for the consequences of any breach on the part of the party of the first part of any of the covenants herein contained, nor of any act of the party of the first part, its agents or servants, nor shall the trustee be held liable for any act, de-
314 fault, or misconduct of any agents or persons employed by it, unless chargeable with gross negligence in the selection or continuance of their employment, nor shall such trustee be answerable, except for its own willful default or gross misconduct, and in case the trustee shall go into possession of said mortgaged premises, and operate the same as hereinbefore provided, it shall be indemnified out of the funds and property which shall come into its hands as aforesaid, for all claims, and demands, against it arising from negligence, carelessness, or misconduct of its officers, agents, or employees; and in all cases the trustee shall be authorized to pay such reasonable compensation as it may deem proper to all attorneys, servants, and agents whom it may reasonably employ in the management of the trust; and the trustee shall be entitled to and shall have just compensation for all services which it may render hereafter in connection with the trust, to be paid by the party of the first part as they are incurred, or out of the estate on which they are hereby made a charge; and the trustee may resign from the trust, by notice in writing to the party of the first part and to all known bondholders of sixty days before such resignation shall take effect, or such shorter time as may be accepted as sufficient notice, and upon the execution and delivery, if such shall be required, of the deed of conveyance and transfer to a successor in trust.

It is expressly agreed between the parties hereto that in case the party of the second part shall hereafter become by law, or otherwise, incapacitated to perform, or shall refuse to perform, the duties herein imposed upon it, then its successor or successors shall
315 be appointed, who shall by such appointment become vested with all the rights, powers, and duties herein imposed upon the said party of the second part. Such appointment shall be made in the manner following: A meeting of the holders of the bonds shall be called in the city of New York, by an advertisement once in each week for sixty days, in one daily paper published in the city of New York, and in one daily paper published in the city of

Santa Cruz, State of California, at the expense of the party of the first part, in which advertisement the time and particular place of such meeting, and the object of the meeting shall be stated; such call shall be made by the president of the party of the first part, or, in case of his neglect or refusal to make the same, then by any of the holders of the said bonds; and the person or persons who shall be appointed at such meeting by a majority of the votes represented at said meeting (each bondholder in person or by proxy in writing being entitled to one vote for each and every bond held by him) shall be such successor or successors, as the case may be, and the minutes of said meeting, signed by the president and secretary thereof, shall be due evidence of such appointment.

Article thirteenth.

In the execution of the interest warrants and coupons secured by these presents, the signature of the president and secretary engraven thereon shall be regarded and treated as in all respects, in fact and in law, equivalent to a manual signing of said coupons.

Article fourteenth.

If the party of the first part shall well and truly pay the
316 sums of money as provided by the said bonds secured hereby and the coupons thereto attached, required to be paid by it, and shall well and truly keep and perform all the covenants, agreements, and undertakings herein and hereby assumed and required to be kept and performed, according to the true intent and meaning of these presents, then and in that case, the estate, right, title, and interest of the said party of the second part, trustee, or its successor or successors, shall cease, determine, and become void.

In witness whereof, the party of the first part has caused its corporate name to be hereunto subscribed by its president, and its corporate seal affixed, attested by its secretary, and in testimony of its acceptance of the trusts herein created and conferred, the said trustee, party of the second part, has caused its corporate name to be hereunto subscribed by its president and its corporate seal affixed, attested by its secretary, the day and year first above written.

[CORPORATE SEAL.] CITY WATER COMPANY OF SANTA CRUZ,
By F. R. KING, *President.*

Attest: E. H. RIXFORD, *Secretary.*

[CORPORATE SEAL.] HOLLAND TRUST COMPANY,
By G. VAN NOSTRAND,
Acting President.

Attest: GEO. W. VAN SICLEN, *Secretary.*

317 Signed, sealed, and delivered as to the City Water Company of Santa Cruz, in the presence of—
H. J. LAND.

Signed, sealed, and delivered as to the Holland Trust Company of New York, in presence of—
WILLIAM H. CLARKSON.

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

On this fourteenth day of May, A. D. 1890, before me, Geo. T. Knox, notary public in and for said city and county of San Francisco, duly commissioned and sworn, personally appeared F. R. King, known to me to be the president, and E. H. Rixford, known to me to be the secretary of the City Water Company of Santa Cruz, the corporation that executed the within instrument, and they duly acknowledged to me that such corporation executed the same. And the said F. R. King and E. H. Rixford, being by me duly sworn, did each depose and say that he, the said F. R. King, was the president of the said City Water Company of Santa Cruz, said corporation, and that he, the said E. H. Rixford, was the secretary of the same corporation; that the seal affixed to the foregoing instrument was the corporate seal of said corporation; that it was affixed thereto by order of the board of directors of said company, and that they signed their names thereto by the like order, as the president and secretary of said corporation respectively.

Witness my hand and official seal the day and year last above written.

[NOTARIAL SEAL.] GEO. T. KNOX,
Notary Public.

318 STATE OF NEW YORK, } ss:
City and County of New York, }

On this fourth day of June, A. D. 1890, before William H. Clarkson, notary public for New York county, and a commissioner of deeds for the State of California, in and for the State of New York, residing in said city of New York, personally appeared G. Van Nostrand, acting president, and George W. Van Siclen, secretary of the Holland Trust Company, the corporation that executed the foregoing instrument as trustee, to me personally known to be the identical persons described in and whose names are affixed to the foregoing instrument as acting president and secretary of said corporation trustee, and severally acknowledged that said corporation trustee executed the same. And the said G. Van Nostrand being by me first duly sworn, and the said George W. Van Siclen being also by me first duly sworn, they did depose and say that he, the said G. Van Nostrand, was the acting president of the said The Holland Trust Company; that he, the said George W. Van Siclen, was the secretary of the same company; that the seal affixed to the foregoing instrument was the corporate seal of said company; that it was affixed thereto by the order of the board of directors of said company; and that they signed their names thereto by the like order as the acting president and secretary of said company respectively.

Witness my hand and official seal the day and year last above written.

[SEAL.] WILLIAM H. CLARKSON, [SEAL.]
319 *Commissioner for the State of California in New York,*
Notary Public for New York County, N. Y.

Filed for record, at the request of E. H. Rixford, June 12, 1890, at thirty minutes past 1 o'clock p. m.; and recorded June 27, 1890.

STATE OF CALIFORNIA, } ss:
County of Santa Cruz, }

I, Ed. Martin, county clerk of the said county of Santa Cruz, State of California, and *ex officio* county recorder in and for said county, do hereby certify that I have compared the foregoing copy with the original record of the trust deed or mortgage from the City Water Company of Santa Cruz to the Holland Trust Company of New York, dated May 1, 1890, and recorded in volume 66 of Mortgages, at page 1, *et seq*, said Santa Cruz county records; and that the same is a full, true, and correct transcript of such original record, and of the whole thereof.

Attest my hand and the seal of said county recorder hereto affixed this thirtieth day of October, A. D. 1897.

ED. MARTIN,
County Recorder,
By B. R. MARTIN,
Deputy Recorder.

[SEAL.]

The defendant then offered and read in evidence a deed of escrow, executed by said City Water Company of Santa Cruz to said Holland Trust Company, dated May 1, 1890, which was marked "Defendant's Exhibit D," and reads as follows:

320 DEFENDANT'S EXHIBIT "D."

Deed of Escrow.

"This indenture witnesseth, whereas, on the sixteenth day of September, 1889, William Edward Coffin, Walter Stanton, Charles Hervey Jackson and Charles F. Street, doing business under the firm name of Coffin & Stanton, entered into a contract with the city of Santa Cruz, in the State of California, in the following words and figures, to wit:

'Contract entered into this sixteenth day of September, 1889, for the purchase of water works, by and between the city of Santa Cruz, a municipal corporation, existing under the laws of the State of California, party of the first part, and William Edward Coffin, Walter Stanton, Charles Hervey Jackson and Charles F. Street, all of the city, county and State of New York, and doing business under the firm name of Coffin & Stanton, the parties of the second part, witnesseth:

Whereas, the city of Santa Cruz desires to acquire a water-works system for said city,

And whereas, Coffin & Stanton desire to furnish such a water-work- system,

Now, therefore, for and in consideration of the sum of one dollar,

paid in hand this sixteenth day of September, 1889, to said city of Santa Cruz by said Coffin & Stanton, the receipt of which is hereby duly acknowledged, and other valuable considerations, the following contract has been entered into:

321 The said city of Santa Cruz agrees to grant to said Coffin & Stanton a franchise for the construction of water works in said city of Santa Cruz, and said Coffin & Stanton agree to construct, or to cause to be constructed, a water-works system which shall in every way be in conformity with the specifications of the engineer employed by said city, which report is hereby referred to and made a part hereof; the works to be constructed subject only to such modifications as may hereafter be mutually agreed upon, or are contained in the contract.

And said city of Santa Cruz agrees to purchase said water works when the same are completed, and to pay for the same the sum of three hundred and twenty thousand dollars, as hereinafter set forth;

And in order to carry out the foregoing provisions of this contract, said Coffin & Stanton shall have the privilege of assigning to whosoever they may elect, any or all of the rights herein granted.

And said Coffin & Stanton shall organize, or cause to be organized, a corporation entitled "City Water Company of Santa Cruz," to which corporation shall be assigned the franchise hereinbefore mentioned;

And said water company shall cause to be issued in due and legal form a first mortgage upon all its properties, rights, titles, and franchises, now owned or hereinafter to be acquired, for an amount not to exceed four hundred thousand dollars, said bonds to bear interest at a rate not to exceed six per cent., and to mature in not more than thirty years; and said bonds shall be dated as soon as practicable after the incorporation of said company;

And said water company shall issue to said Coffin & Stan-

322 ton at various times during the progress of the work of construction, a sufficient number of said first-mortgage bonds as shall be required to pay for the construction of said water works, said Coffin & Stanton agreeing to make all necessary cash advances.

It is understood, however, that said water company shall not at any time issue bonds in excess of three hundred and twenty thousand dollars, except as shall be hereinafter provided, to wit:

That in the event of any changes or additions to said water-works system, as described in said report herein referred to, and then said water company shall have the right to issue a sufficient number of said first-mortgage bonds at ninety cents on the dollar to pay for such changes and additions, and said water company shall also have the right to issue bonds at a price not below ninety cents on the dollar, to pay the interest on any of the outstanding bonds of said water company, except such outstanding bonds as are held in escrow hereinafter referred to.

And when said Coffin & Stanton shall have received all of said three hundred and twenty thousand dollars bonds, and when said water company shall have completed said water works, then said

Coffin & Stanton shall deposit with the American Loan and Trust Company of New York, or such other trustee as may be agreed upon by the parties hereunto, two hundred and seventy thousand dollars of said bonds, which shall be held in trust by said trust company to secure a like amount, viz: two hundred and seventy thousand dollars five per cent. bonds of said city of Santa Cruz, which said city has heretofore sold to said Coffin & Stanton.

323 And the deed of trust or escrow under which said water company bonds shall be deposited shall provide that, when any of the annual installments of said city of Santa Cruz five per cent. bonds shall be paid by the city, the said trust company shall cancel a similar amount of the firs.-mortgage bonds, and continue so to do until all of said water company's bonds deposited with them are canceled.

And if said city of Santa Cruz shall default in the payment of the principal, or any of the installments thereof, or any of the interest coupons of said city five per cent. bonds, and shall continue in such default for a period of six months, then said trust company shall be authorized to deliver said first-mortgage water company bonds to the holder of said five per cent. city bonds, and provisions to this effect shall be contained in said deed of trust or escrow.

And when said water company shall have fully completed said water works, then said water company shall convey absolutely to said city of Santa Cruz, all its property, rights, titles and franchises, to have and to hold forever, subject only to the mortgage and to the deed of trust or escrow hereinbefore mentioned.

And said city of Santa Cruz agrees to set aside from the gross revenues derived from said water works, an amount sufficient to pay the interest on said first-mortgage bonds outstanding, except those held in escrow, and after five years an amount sufficient to form a sinking fund for the redemption of said outstanding bonds at maturity, except as — those so held in escrow.

And said water company shall commence operations of the
324 construction of said water works as soon as practicable, and shall have the whole completed within one year of such commencement, provided, however, that neither said water company or said Coffin & Stanton shall be held in any way responsible for delays, which are unavoidable or beyond their control, provided also that said city of Santa Cruz shall convey to said water company, clear and unencumbered rights to at least three-quarters of the riparian right to Laguna creek, the proposed source of supply for said water works, or at least three-quarters of such water.

Also a clear right of way throughout the entire system for the laying of all necessary pipes and mains; and also clear title to all lands necessary for reservoir sites, or to such other lands as may be found necessary for the effective operation of said water works, all of which said transfers of rights, or water rights of way and reservoir sites, shall be subject to the legal and equitable rights of said city to the performance of this contract, according to its meaning and intent.

And said water company shall not be called upon to begin work

until such properties shall have been conveyed to said water company, and until the right to the same shall have been examined and approved by the counsel of said water company.

And said Coffin & Stanton shall hold themselves personally and individually for any damage which may accrue to said city by the failure of said water company to construct said water works, and to convey property of said water company to said city of Santa Cruz, as hereinbefore set forth.

325 And said Coffin & Stanton do hereby guarantee performance of all the acts of said water company herein specified.

And it is hereby mutually agreed and made part of this contract that, in the event of the failure of said Coffin & Stanton, or said water company, to perform their part of this contract, then said city of Santa Cruz shall be entitled to collect from said Coffin & Stanton the sum of fifty thousand — as liquidated damages, which said sum actually represents the loss to said city of Santa Cruz by the failure of said Coffin & Stanton, or said water company, to perform their part of this contract.

And said city of Santa Cruz agrees to enter into any further contracts or agreements with said Coffin & Stanton, or said water company, which may be necessary effectually to carry out the spirit and intent of this contract.

In witness whereof the respective parties to these presents have hereunto set their hands and seals the day and year first hereinabove written.

CITY OF SANTA CRUZ,
By G. BOWMAN, *Mayor.*
COFFIN & STANTON.

[Seal of City of Santa Cruz.]

Attest: O. J. LINCOLN, *City Clerk.*'

And whereas, on the twenty-third day of December, 1889, the said Coffin & Stanton entered into a further agreement with the said city of Santa Cruz in the words and figures following:

'Memorandum of agreement in the matter of the sale of two
326 hundred and seventy dollars five per cent. bonds of the city of Santa Cruz, and in the matter of the purchase of water works by the said city of Santa Cruz.

Whereas, Coffin & Stanton have purchased two hundred and seventy thousand dollars five per cent. bonds of the city of Santa Cruz, and have entered into an agreement under date of the sixteenth day of September, 1889, with the city of Santa Cruz for the sale to said city of certain water works, named therein.

And whereas, it is desired that the proceeds of the sale of said bonds shall be used solely for the purpose of said works for the redemption of said bonds.

Now, therefore, it is agreed between said city of Santa Cruz and the said Coffin & Stanton, that said city shall deposit with said Coffin & Stanton the sum of two hundred and forty-five thousand

dollars of said proceeds, which sum shall be placed to the credit of said city of Santa Cruz on the books of said Coffin & Stanton for the use of City Water Company of Santa Cruz, referred to in said contract of September 16, said Coffin & Stanton agreeing to use said fund to carry out the contract hereinbefore mentioned, or, in event of the failure of said city to acquire said water works in accordance with said contract, then said fund shall be applied by said Coffin & Stanton to the retirement and redemption of the aforesaid mentioned two hundred and seventy thousand dollars five per cent. bonds of said city of Santa Cruz, and for the repayment to said city of any payments it may have made on said bonds; or said Coffin & Stanton and the individual members of said firm shall be personally liable for the full amount.

327 And it is hereby mutually agreed and made part of this contract that, in the event of the failure of said Coffin & Stanton to perform their part of this, then said city of Santa Cruz shall be entitled to collect the sum of three hundred thousand dollars as liquidated damages from the said firm of Coffin & Stanton, or from any or all of the individual members thereof, namely, William Edwin Coffin, Walter Stanton, Charles Hervey Jackson, and Charles F. Street, all of the city and county and State of New York. The aforesaid sum of three hundred thousand dollars actually representing loss of said city of Santa Cruz from the failure of said Coffin & Stanton to perform their part of this contract.

And it is further agreed that when the contracts for the construction of said water works are awarded, if they shall be awarded by said water company, that said Coffin & Stanton shall procure from said contractors good and sufficient bonds in amount of one hundred and fifty thousand dollars, which bonds shall be assigned and delivered to said city of Santa Cruz, as additional security for the fulfillment of this agreement, and of the contracts hereinbefore referred to.

In witness whereof, the respective parties to these presents have hereunto set their hands and seals this twenty-third day of September, 1889.

Signed, sealed and delivered in presence of—

C. BOWMAN, [SEAL.]
Mayor City of Santa Cruz.

O. J. LINCOLN,
[SEAL.] *City Clerk.*'

328 And whereas, in pursuance of such agreement, said Coffin & Stanton organized a corporation which was duly incorporated under the laws of the State of California, under the name of the City Water Company of Santa Cruz;

And the said city of Santa Cruz, on the twentieth day of November, 1889, granted, bargained, and sold unto the said City Water Company, its successors and assigns, all the right, title and interest of the said city of Santa Cruz in and to the waters of the Laguna creek, in the county of Santa Cruz, and all their riparian rights ap-

pertaining to the lands bordering on said Laguna creek, lying below the point of section 30, township 10, south, range 20 west, Mount Diablo meridian, where the water of said creek are to be taken and diverted for the purposes of the said City Water Company of Santa Cruz, and between said point of diversion and the Pacific ocean, that is to say, all such rights therein or thereto as the said city of Santa Cruz had at that time, or might thereafter acquire; and also all such easements and rights of way of every nature and description which had been acquired, or which may hereafter be acquired by the said city of Santa Cruz in connection therewith, and for the purpose of constructing and introducing the waters of said Laguna creek into the said city of Santa Cruz; and also all lands and reservoirs to be acquired by the said city of Santa Cruz in connection with and for the purpose of *constructing* said water into said city; also all rights of property of whatever kind or nature which the said city has, or may acquire, for said purpose or in connection therewith, together with all and singular the tenements, hereditaments and ap-
329 purtenances thereunto belonging or in anywise appertaining, or reversion and reversions, remainder and remainders, rents, issues and profits thereof; upon the distinct condition, however, expressed in said deed, that the agreement aforesaid be performed by said Coffin & Stanton and by the said City Water Company strictly in accordance with the terms thereof.

And whereas, the said City Water Company has executed its certain four hundred first-mortgage bonds, each of the denomination of one thousand dollars, and has deposited the same at the Holland Trust Company of New York, trustee, under the mortgage executed by said City Water Company to said trust company.

Now, therefore, know all men by these presents, that the said City Water Company of Santa Cruz has deposited and does hereby deposit said bonds with the said Holland Trust Company to be holden by said Holland Trust Company, and to be certified, issued, and delivered only in pursuance of the terms and conditions of the agreements and deed hereinbefore recited, it being distinctly understood and expressed that fifty of said bonds numbered from one to fifty be immediately certified and issued by said trustee, and delivered to Coffin & Stanton, bankers of New York, to whom the same have been sold; and that a resolution of the board of directors of the said City Water Company supported by the affidavit of its president and secretary, shall be deemed to be sufficient proof of the facts therein stated to authorize the issue of any or all of the remainder of said bonds for improvements, extensions, additions and repairs, and a notary's certificate of protest for non-payment of prin-
330 cipal or interest of the bonds of the city of Santa Cruz, shall be sufficient evidence to authorize the certification and issue of the two hundred and seventy bonds to be held until default in payment of such interest or principal occurs.

In witness whereof, the said City Water Company of Santa Cruz has caused these presents to be signed with its corporate seal by F. R. King, its president, and its corporate seal to be hereunto af-

fixed and attested by E. H. Rixford, its secretary, on the first day of May, 1890.

[SEAL.] CITY WATER CO., SANTA CRUZ,
By F. R. KING, *President.*

Attest: E. H. RIXFORD, *Secretary.*

STATE OF CALIFORNIA, }
City of and County of San Francisco, } *ss:*

On this fourteenth day of May, 1890, before me, Geo. T. Knox, a notary public in and for the city and county of San Francisco, duly commissioned and sworn, personally appeared F. R. King, known to me to be the president, and E. H. Rixford, known to me to be the secretary of the City Water Company of San Francisco, a corporation that executed the within instrument, and they duly acknowledged to me that said corporation executed the same.

And the said F. R. King and the said E. H. Rixford being by me duly sworn, did each depose and say that he, the said F. R. King, as the president of said City Water Company of Santa Cruz, and that he, the said E. H. Rixford, was the secretary for the same cor-
331 poration; that the seal affixed to the foregoing instrument was the corporation seal of said corporation; that it was affixed thereto by order of the board of directors of the said City Water Company; and that they signed their names thereto by the like order as the president and secretary respectively of said corporation.

"Witness my hand and official seal the day and year last above written.

"(Signed) GEO. T. KNOX,
"[SEAL.] *Notary Public.*

"(Endorsed:) Deed of escrow. City Water Company of Santa Cruz to Holland Trust Company."

Defendant then offered and read in evidence a deed purporting to have been executed by said City Water Company of Santa Cruz, and dated the twenty-ninth day of March, 1892, which said deed was marked "Defendant's Exhibit E," and reads as follows:

DEFENDANT'S EXHIBIT "E."

Deed by City Water Co. to City of Santa Cruz.

"Whereas, on the sixteenth day of September, 1889, the city of Santa Cruz, a municipal corporation existing under the laws of the State of California, entered into an agreement with William Edward Coffin, Walter Stanton, Charles Hervey Jackson, and Charles F. Street, doing business under the firm name of Coffin & Stanton, which agreement is in the following words, to wit:

"'Contract entered into this sixteenth day of September,
332 1889, for the purchase of water works, by and between the city of Santa Cruz, a municipal corporation, existing under

the laws of the State of California, party of the first part, and William Edward Coffin, Walter Stanton, Charles Hervey Jackson, and Charles F. Street, all of the city, county, and State of New York, and doing business under the firm name of Coffin & Stanton, the parties of the second part:

"'Witnesseth: Whereas, the city of Santa Cruz desires to acquire a water-works system for said city;

"'And, whereas, Coffin & Stanton desire to furnish such a water-works system;

"'Now, therefore, for and in consideration of the sum of one dollar paid in hand this sixteenth day of September, 1889, to said city of Santa Cruz, by said Coffin & Stanton, the receipt of which is hereby duly acknowledged, and other valuable considerations the following contract has been entered into:

"'The said city of Santa Cruz agrees to grant to said Coffin & Stanton a franchise for the construction of water works in said city of Santa Cruz, and said Coffin & Stanton agree to construct, or cause to be constructed, a water-works system, which shall in every way be in conformity with the specifications of the engineer employed by said city, which specifications are embodied in the report by said engineer, under date of July 30, 1889, which report is hereby referred to and made a part hereof: The works to be constructed subject only to such modifications as may hereafter be mutually agreed upon, or are contained in this contract. And said city of Santa Cruz agrees to purchase said water works when the same are completed, and to pay for the same the sum of three hundred and twenty thousand dollars, as hereinafter set forth;

333

"'And in order to carry out the foregoing provisions of this contract, said Coffin & Stanton shall have the privilege of assigning to whomsoever they may elect, any or all of the rights herein granted;

"'And said Coffin & Stanton shall organize, or cause to be organized, a corporation entitled, "City Water Company of Santa Cruz," which said corporation shall be assigned the franchise hereinbefore mentioned;

"'And said water company shall cause to be issued in due and legal form a first mortgage upon all its properties, rights, titles, and franchises now owned or hereafter to be acquired, for an amount not to exceed four hundred thousand dollars, said bonds to bear interest at a rate not to exceed six per cent, and to mature in not more than thirty years; and said bonds shall be dated as soon as practicable after the incorporation of said company;

"'And said water company shall issue to said Coffin & Stanton at various times during the progress of the work of construction a sufficient number of said first-mortgage bonds, as shall be required to pay for the construction of said water works, said Coffin & Stanton agreeing to make all necessary cash advances.

"'It is understood, however, that said water company shall not at any time issue bonds in excess of three hundred and twenty thousand dollars, except as shall be hereinafter provided, to wit:

"'That in the event of any changes or additions to said water-
334 works system, as described in said report herein referred to, and then said water company shall have the right to issue a sufficient number of said first-mortgage bonds at ninety cents on the dollar to pay for such changes and additions, and said water company shall also have the right to issue bonds at a price not below ninety cents on the dollar, to pay the interest or any of the outstanding bonds of said water company, except such outstanding bonds as are held in escrow, hereinafter referred to.

"'And when said Coffin & Stanton shall have received all of said three hundred and twenty thousand dollar bonds, and when said water company shall have completed said water works then said Coffin & Stanton shall deposit with the American Loan & Trust Company of New York, or such other trust company as may be agreed upon by the parties hereto, two hundred and seventy thousand dollars of said bonds, which shall be held in trust by said trust company, to secure a like amount, viz: Two hundred and seventy thousand dollars five per cent. bonds of said city of Santa Cruz, which said city has heretofore sold to said Coffin & Stanton, and the deed of trust or escrow under which said water company bonds shall be deposited, shall provide that when any of the annual installments of said city of Santa Cruz five per cent. bonds shall be paid by said city, then said trust company shall cancel a similar amount of the first-mortgage bonds, and continue so to do until — of said water company's bonds, deposited with them, are cancelled.

"'And, if said city of Santa Cruz shall default in the pay-
335 ment of the principal, or any of the installments thereof, or any of the interest coupons of said city five per cent. bonds, and shall continue in such default for a period of six months, then said trust company shall be authorized to deliver said first-mortgage water company bonds to the holders of said five per cent. city bonds, and provisions to this effect shall be contained in said deed of trust or escrow.

"'And when said water company shall have fully completed said water works, then said water company shall convey absolutely to said city of Santa Cruz, all its property, rights, titles, and franchises, to have and to hold forever subject only to the mortgage and to the deed of trust or escrow, hereinbefore mentioned.

"'And said city of Santa Cruz agrees to set aside from the gross revenue derived from said water works, an amount sufficient to pay the interest on said first mortgage bonds outstanding except those held in escrow, and after five years an amount sufficient to form a sinking fund for the redemption of said outstanding bonds at maturity, except as to those so held in escrow.

"'And said water company shall commence operations on the construction of said water works as soon as practicable, and shall have the whole completed within one year of such commencement, provided, however, that neither said water company or said Coffin & Stanton shall be held in any way responsible for delays which are unavoidable or beyond their control, provided also, that said city of Santa Cruz shall convey to said water company clear and unen-

cumbered rights to at least three-quarters of the riparian
336 rights to Laguna creek, the proposed source of supply for said water works, or to at least three-quarters of such water;

"'Also, a clear right of way throughout the entire system for the laying of all necessary pipes, or mains, and also clear title to all lands necessary for reservoir sites, or to such other lands as may be found necessary for the effective operation of said water works, all of which said transfers of rights, or water, rights of way, and reservoir sites, shall be subject to the legal and equitable rights of said city to the performance of this contract according to its true meaning and intent.

"'And said water company shall not be called upon to begin work until such properties shall have been conveyed to said water company, and until the title to the same shall have been examined and approved by the counsel of said water company.

"'And said Coffin & Stanton shall hold themselves personally and individually liable for any damages which may accrue to said city by the failure of said water company to construct said water works, and to convey the property of said water company to said city of Santa Cruz, as hereinbefore set forth.

"'And said Coffin & Stanton do hereby guarantee the performance of all the acts of said water company herein specified.

"'And it is hereby mutually agreed and made a part of this contract, that in the event of the failure of said Coffin & Stanton, or said water company, to perform their part of this contract, then said city of Santa Cruz shall be entitled to collect from said
337 Coffin & Stanton the sum of fifty thousand dollars as liquidated damages, which sum actually represents the loss to said city of Santa Cruz by the failure of said Coffin & Stanton, or said water company, to perform their part of this contract.

"'And said city of Santa Cruz agrees to enter into any further contracts or agreements with said Coffin & Stanton, or said water company, which may be necessary, effectually to carry out the spirit and intent of this contract.

"'In witness whereof, the respective parties to these presents have hereunto set their hands and seals the day and year first hereinabove written.

"'CITY OF SANTA CRUZ,
"'By G. BOWMAN, *Mayor.*

"'[Seal of the City of Santa Cruz.]

"'COFFIN & STANTON.

"'Attest: O. J. LINCOLN, *City Clerk.*'

"And, whereas, on the twenty-third day of September, 1889, said city of Santa Cruz entered into a further agreement with said Coffin & Stanton, which agreement is in the following words, to wit:

"'Memorandum of agreement, in the matter of the sale of two hundred and seventy thousand dollars, five per cent. bonds of the city of Santa Cruz, and in the matter of the purchase of water works by the said city of Santa Cruz.

"'Whereas, Coffin & Stanton have purchased two hundred
338 and seventy thousand dollars, five per cent. bonds of the city of Santa Cruz, and have entered into an agreement of date of the sixteenth day of September, 1889, with the city of Santa Cruz for the sale to said city of certain water works named therein.

"'And, whereas, it is desired that the proceeds of the sale of said bonds shall be used solely for the purpose of said works, or the redemption of said bonds:

"'Now, therefore, it is agreed between said city of Santa Cruz and the said Coffin & Stanton that said city shall deposit with said Coffin & Stanton the sum of two hundred and forty-five thousand dollars of said proceeds, which sum shall be placed to the credit of said city of Santa Cruz on the books of said Coffin & Stanton for the use of City Water Company of Santa Cruz referred to in said contract of September 16, said Coffin & Stanton agreeing to use said fund to carry out the contract hereinbefore mentioned; or, in the event of the failure of said city to acquire said water works in accordance with said contract, then said funds shall be applied by said Coffin & Stanton to the retirement and redemption of the aforesaid mentioned two hundred and seventy thousand dollars five per cent. bonds of said city of Santa Cruz, and for the repayment to said city of any payments it may have made on said bonds; or said Coffin & Stanton, and the individual members of said firm shall be personally liable for the full amount.

"'And it is hereby mutually agreed and made a part of this contract, that in the event of the failure of said Coffin & Stanton to perform their part of this, then said city of Santa Cruz shall be
339 entitled to collect the sum of three hundred thousand dollars, as liquidated damages from the said firm of Coffin & Stanton, or from any or all of the individual members thereof, namely, William Edward Coffin, Walter Stanton, Charles Hervey Jackson, and Charles F. Street, all of the city and county and State of New York.

"'The afore- sum of three hundred thousand dollars actually representing the loss to said city of Santa Cruz, from the failure of said Coffin & Stanton to perform their part of this contract.

"'And it is further agreed that when the contracts for the construction of said water works, if they shall be awarded by said water company, that said Coffin & Stanton shall secure from such contractor good and sufficient bonds in the amount of one hundred and fifty thousand dollars, which bonds shall be assigned and delivered to said city of Santa Cruz as additional security for the fulfillment of this agreement, and of the contracts hereinbefore referred to.

"'In witness whereof, the respective parties to these presents have

hereunto set their hands and seals, this twenty-third day of September, 1889.

"'G. BOWMAN, [SEAL.]
"'*Mayor City of Santa Cruz.*
"'COFFIN & STANTON. [SEAL.]

"'Signed, sealed and delivered in the presence of—
"'O. J. LINCOLN, *City Clerk.* [SEAL.]'

340 "And, whereas, in pursuance of said two agreements, this corporation was organized under the corporate name of 'City Water Company of Santa Cruz.'

"And, whereas, in pursuance of said two agreements, the said city of Santa Cruz did, by its deed dated the twentieth day of November, 1889, and recorded in the office of the county recorder of the city of Santa Cruz, State of California, in volume 71 of Deeds, at page 191, conveying to this corporation all its right, title and interest in and to the waters of Laguna creek, in said county of Santa Cruz, and all its right, title and interest in and to the riparian rights pertaining to the lands bordering on said Laguna creek, which it had then or might thereafter acquire, and also such easements and rights of way which it had then or might thereafter acquire in connection with and for the purpose of conducting and introducing the waters of said Laguna creek into said city of Santa Cruz; and also all lands and reservoir sites then acquired or to be acquired by it in connection with and for the purpose of the conducting of said water into said city, and also all rights and property of whatever kind or nature which it then had or owned, or which it might thereafter acquire for said purpose or in connection therewith.

"And, whereas, also in pursuance of said two agreements, said city of Santa Cruz did grant to said Coffin & Stanton, by ordinance No. 188 of its common council, a franchise and right of way to construct a system of water works mentioned in said agreements, all of which rights so granted to them were afterwards, by said Coffin & Stanton, assigned and transferred to this corporation;

341 "And, whereas, also in pursuance of said two agreements, this corporation had issued its bonds, four hundred in number, each for the sum of one thousand dollars, and numbered from one to four hundred, all bearing date the first day of May, 1890, and payable to the Holland Trust Company of New York, trustee, or bearer, on the first day of May, 1910, or at such times as its sinking fund shall be able to redeem said bonds, with interest at the rate of six per cent. per annum, payable semi-annually, on the first-days of May and November in each year, according to coupons attached thereto, and secure the payment of the principal and interest of said bonds, this corporation did execute and deliver to said Holland Trust Company of New York its certain mortgage or deed of trust, bearing date the first day of May, 1890, whereby it mortgaged and conveyed to said Holland Trust Company of New York, trustee, all its property for the purposes stated in said mortgage or deed of trust, which said mortgage or deed of trust now of record in the

office of the city recorder, and the record thereof is hereby referred to;

"And, whereas, said system of water works has been fully completed to the satisfaction of said city of Santa Cruz, and said water works have been accepted by it;

"Now, therefore, resolved, that this corporation, in pursuance of said two agreements, execute and deliver to said city of Santa Cruz a deed conveying it, all and singular, its entire property, including all rights, power, privileges, and franchises, which may have been granted or conferred upon it by the State of California and said city of Santa Cruz, or which may hereafter be so granted or con-
342 ferred, together with all the estate and property, real, personal and mixed, now owned, or which may hereafter be acquired by it, situate in the city of Santa Cruz or vicinity, and all erections and buildings, all machinery, engines, and reservoirs, pumps, wells, pipes, and other constructions, tools, implements and fixtures of every kind and nature, made, manufactured, constructed, built, laid, purchased or in any way acquired in or about the construction, maintenance and operation of said system of water works, in the State of California, aforesaid, and all the income, rents, profits, emoluments and moneys derived from said water works, including any sum or sums of money which may be paid by said city of Santa Cruz and the inhabitants thereof, under and by virtue of any contract with either of them, including any revenues from any other source whatsoever, or which may be payable to, or collectible by this corporation under the constitution and laws of the State of California, such conveyance to be made subject to said mortgage or deed of trust, and the obligations thereby imposed, the payment of which is to be assumed by said city of Santa Cruz;

"And F. R. King, the president, and E. H. Rixford, the secretary, are hereby authorized and directed to execute and deliver said deed and conveyance in the name of and under the seal of this corporation.

"I hereby certify that the foregoing is a true copy of a resolution adopted by the board of directors of the City Water Company of Santa Cruz, a corporation organized and existing under the laws of the State of California, having its office at the city and county of San Francisco, in said State, at a regular meeting of said
343 board, duly and regularly convened, and held at the office on the twenty-ninth day of March 1892.

"Witness my hand and the seal of said corporation this twenty-ninth day of March, 1892.

"[SEAL.] E. H. RIXFORD, *Secretary.*

"This indenture, made this twenty-ninth day of March, A. D. one thousand eight hundred and ninety-two (1892), between the City Water Company of Santa Cruz, a corporation organized and existing under the laws of the State of California, and having its office at the city and county of San Francisco, in said State, the party of the first part, and the City of Santa Cruz, a municipal corporation,

existing under the laws of the State of California, the party of the second part—

"Witnesseth: That, whereas, on the sixteenth day of September, 1889, said party of the second part entered into an agreement with said Coffin & Stanton, a copy of which is set out at full length in the resolution, a copy of which resolution is hereto attached, and on the twenty-third day of September, 1889, said party of the second part entered into another contract with said Coffin & Stanton, a copy of which is also set out at full length in said resolution;

"And, whereas, in pursuance of said two agreements, the party of the first part was organized under the name of 'City Water Company of Santa Cruz.'

"And, whereas, in pursuance of said two agreements the
344 party of the second part did by its deed dated the twentieth day of November, 1889, and recorded in the office of the county recorder of the county of Santa Cruz, State of California, in volume 71 of Deeds, at page 191, conveyed to the party of the first part all its right, title, and interest in and to the waters of Laguna creek in said county of Santa Cruz, and all its right, title, and interest in and to the riparian rights pertaining to the lands bordering on said Laguna creek, which it had then or might thereafter acquire, and also all such easements and rights of way which it then had or might thereafter acquire in connection with and for the purpose of conducting and introducing the waters of said Laguna creek into said city, of Santa Cruz, and also all lands and reservoir sites then acquired or to be acquired by it in connection with and for the purpose of conducting the said water into said city, and also all rights and property of whatsoever kind or nature which it then had or owned, or which it might thereafter acquire for said purpose, or in connection therewith;

"And whereas, also in pursuance of said two agreements, said party of the second part did grant to said Coffin & Stanton, by ordinance No. 188 of its common council a franchise and right of way to construct the system of water works mentioned in said agreements, all of which said rights so granted to them were afterwards by said Coffin & Stanton assigned and transferred to the party of the first part;

"And, whereas, also in pursuance of said two agreements, the party of the first part has issued its bonds, four hundred in number, each for the sum of one thousand dollars, and numbered
345 from one to four hundred, all bearing date the first day of May, 1890, and payable to the Holland Trust Company of New York, trustee, or bearer, on the first day of May, 1910, or at such times as its sinking fund shall be able to redeem said bonds with interest at the rate of six per cent. per annum, payable semi-annually on the first days of May and November in each year, according to coupons attached thereto, and to secure the payment of the principal and interest of said bonds, the party of the first part did execute and deliver to said Holland Trust Company of New York its certain mortgage or deed of trust bearing date the said first day of May, 1890, whereby it mortgaged and conveyed to said

Holland Trust Company of New York, trustees, all its property for the purposes stated in said mortgage or deed of trust, which said mortgage or deed of trust is now of record in the office of said county recorder, and the record thereof is hereby referred to;

"And, whereas, the said system of water works has been fully completed to the satisfaction of the party of the second part, and said water works have been accepted by it:

"Now, therefore, the party of the first part, in consideration of the premises and of the sum of one dollar to it paid by the party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, and conveyed, and does hereby grant, bargain, sell, and convey to the party of the second part, its successors and assigns, subject to the said mortgage or deed of trust, all and singular, the entire property of the party of the first part, including all rights, powers, privileges, and franchises, which have been granted or conferred upon it by the State of California and
346 said party of the first part, or which may hereafter be so granted or conferred, together with all estate and property, real, personal and mixed, now owned, or which may hereafter be acquired by it, situate in the city of Santa Cruz and vicinity, and all erections and buildings, all machinery, engines and reservoirs, pumps, wells, pipes, and other constructions, tools, implements and fixtures of every kind and nature, made, manufactured, constructed, built, laid, purchased, or in any way acquired in or about the construction, maintenance and operation of said system of water works in the State of California aforesaid, and all the income, rents, profits and emoluments, and moneys derived from said water works, including any sum or sums of money which may be paid by said party of the second part, and the inhabitants thereof, under and by virtue of any contract with either of them, including any revenues from any other source whatsoever, or which may be payable to or collectible by the party of the first part under the constitution and laws of the State of California.

"To have and to hold the same and every part thereof unto the said party of second part, its successors and assigns, subject, however, to said mortgage or deed of trust, and all the obligations thereby imposed, which bonds, mortgage or deed of trust, and obligations, the party of the second part agrees to pay and perform.

"In witness whereof, the party of the first part has caused these presents to be executed by its president and secretary under
347 its corporate seal, the day and year first above written, in accordance with a resolution of its board of directors, a copy of which is hereto attached.

"CITY WATER COMPANY OF SANTA CRUZ.

"By F. R. KING, *President, and*

"[SEAL.] "E. H. RIXFORD, *Secretary.*

"Signed, sealed, and delivered in the presence of—

"THOS. E. HAVEN.

"STATE OF CALIFORNIA, } ss:
"*City and County of San Francisco,* }

"On the first day of April, in the year one thousand eight hundred and ninety-two (1892), before me, Thomas E. Haven, a notary public in and for the city and county of San Francisco, State of California, residing therein, duly commissioned and qualified, personally appeared F. R. King (president), and E. H. Rixford (secretary), known to me to be the president and secretary respectively of the 'City Water Company of Santa Cruz,' the corporation that executed the within instrument, and acknowledged to me that such corporation executed the same.

"In witness whereof, I have hereunto set my hand and affixed my official seal, at my office, in said city and county of San Francisco, the day and year in this certificate first above written.

"THOS. E. HAVEN,

"*Notary Public in and for the City and County*
"[NOTARIAL SEAL.] *of San Francisco, State of California.*

348 "(Endorsed:) Deed. City Water Company of Santa Cruz to the City of Santa Cruz. Dated March 29, 1892. Filed for record at the request of O. J. Lincoln, March 6, A. D. 1894, at 5 o'clock p. m., and recorded in vol. 97 of Deeds, page 234, March 20, 1894, Santa Cruz county records. Ed. Martin, county recorder, by N. L., deputy recorder."

Defendant then offered and read in evidence a deed from the City of Santa Cruz to the City Water Company of Santa Cruz, purporting to have been executed on the twentieth day of November, 1889, which deed was marked "Defendant's Exhibit H," and reads as follows:

DEFENDANT'S EXHIBIT "H."

Indenture—City of Santa Cruz and City Water Co.

"This indenture, made the twentieth day of November, A. D. eighteen hundred and eighty-nine, between the City of Santa Cruz, a municipal corporation, existing under the laws of the State of California, the party of the first part, and the City Water Company of Santa Cruz, a corporation organized and existing under the laws of said State, and having its office and principal place of business at the city and county of San Francisco, in said State, party of the second part, witnesseth:

"Whereas, on the sixteenth day of September, 1889, said party of the first part entered into an agreement with William Edward Coffin, Walter Stanton, Charles Hervey Jackson, and Charles F. Street, doing business under the firm name of Coffin & Stanton, which agreement is in the following words, to wit:

349 "'Contract entered into this sixteenth day of September, 1889, for the purchase of water works, by and between the City of Santa Cruz, a municipal corporation existing under

the laws of the State of California, party of the first part, and William Edward Coffin, Walter Stanton, Charles Hervey Jackson and Charles F. Street, all of the city and county and State of New York, and doing business under the firm name of Coffin & Stanton, the parties of the second part, witnesseth:

"'" Whereas, the City of Santa Cruz desires to acquire a water-works system for said city; and

"'" Whereas, Coffin & Stanton desire to furnish such a water-works system;

"'" Now, therefore, for and in consideration of the sum of one dollar paid in hand this sixteenth day of September, 1889, to said City of Santa Cruz, by said Coffin & Stanton, the receipt of which is hereby duly acknowledged, and other valuable considerations, the following contract has been entered into:

"'" The said City of Santa Cruz agrees to grant to said Coffin and Stanton a franchise for the construction of water works in said city of Santa Cruz, and said Coffin & Stanton agree to construct or cause to be constructed a water works system, which shall in every way be in conformity with the specifications of the engineer employed by said city, which specifications are embodied in the report by said engineer, under date of July 13, 1889; which report is hereby referred to and made a part hereof; the works to be constructed subject only to such modifications as may hereafter be mutually
350 agreed upon or are contained in this contract. And said City of Santa Cruz agrees to purchase said water works when the same are completed, and to pay for the same the sum of three hundred and twenty thousand dollars, as hereinafter set forth. And in order to carry out the foregoing provisions of this contract, said Coffin & Stanton shall have the privilege of assigning to whomsoever they may elect, any or all of the rights herein granted; and said Coffin & Stanton shall organize, or cause to be organized, a corporation entitled "City Water Company of Santa Cruz," to which corporation shall be assigned the franchise hereinbefore mentioned; and said water company shall cause to be issued in due and legal form, a first mortgage upon all its properties, rights, titles, and franchise, now owned or hereinafter to be acquired for an amount not to exceed four hundred thousand dollars, said bonds to bear interest at a rate not to exceed six per cent., and to mature in not more than thirty years; and said bonds shall be dated as soon as practicable after the incorporation of said company.

"'" And said water company shall issue to said Coffin & Stanton at various times during the progress of the work of construction a sufficient number of said first-mortgage bonds as shall be required to pay for the construction of said water works, said Coffin and Stanton agreeing to make all necessary cash advances.

"'" It is understood, however, that said water company shall not at any time issue bonds in excess of three hundred and twenty thou-
dollars, except as shall be hereinafter provided, to wit: that
351 in the event of any change or addition to said water-works system, as described in said report herein referred to, then said water company shall have the right to issue a sufficient num-

ber of said first-mortgage bonds at ninety cents on the dollar, to pay for such changes and additions, and said water company shall also have the right to issue bonds at the price not below ninety cents on the dollar, to pay the interest on any of the outstanding bonds of said water company, except such outstanding bonds as are held in escrow, hereinafter referred to. And when said Coffin & Stanton shall have received all said three hundred and twenty thousand dollar bonds, and when said water company shall have completed said water works, then said Coffin & Stanton shall deposit with the American Loan & Trust Company of New York, or such other trust company as may be agreed upon by the parties hereto, two hundred and seventy thousand dollars of said bonds, which shall be held in trust by said trust company, to secure a like amount, viz: two hundred and seventy thousand dollars, five per cent. bonds of said city of Santa Cruz, which said city has heretofore sold to said Coffin & Stanton. And the deed of trust or escrow under which said water company bonds shall be deposited, shall provide that when any of the annual installments of said city of Santa Cruz five per cent. bonds shall be paid by said city, then said trust company shall cancel a similar amount of the first-mortgage bonds, and continue so to do until all said water company's bonds deposited with them are cancelled. And if said City of Santa Cruz shall default in the payment of the principal, or any of the installments thereof, or
352 any of the interest coupons of said city five per cent. bonds, and shall continue in such default for the period of six months, then said trust company shall be authorized to deliver said first-mortgage water company bonds to the holder of said five per cent. city bonds, and provisions to this effect shall be contained in said deed of trust or escrow. And when said water company shall have fully completed said water works, then said water company shall convey absolutely to said City of Santa Cruz all its property, rights, titles, and franchises, to have and to hold forever, subject only to the mortgage and to the deed of trust or escrow hereinbefore mentioned. And said City of Santa Cruz agrees to set aside from the gross revenue derived from said water works, an amount sufficient to pay the interest upon the first-mortgage bonds outstanding, except those held in escrow, and after five years an amount sufficient to form a sinking fund for the redemption of said outstanding bonds at maturity, except *as* those so held in escrow. And said water company shall commence operations on the construction of said water works as soon as practicable, and shall have the whole completed within one year of such commencement, provided, however, that neither said water company nor said Coffin & Stanton shall be held in any way responsible for delays which are unavoidable or beyond their control, provided, also, that said City of Santa Cruz shall convey to said water company clear and unincumbered rights to at least three-quarters of the riparian rights to Laguna creek, the proposed source of supply for said water works, or to at least three-quarters of such water; also, a clear right of way throughout the entire system for the laying of all necessary pipes, or mains,
353 and also clear title to all lands necessary for reservoir sites, or such other lands as may be found necessary for the effective

operation of said water works, all of which said transfers of rights or water, rights of way and reservoir sites shall be subject to the legal and equitable right of said city to the performance of this contract according to its true meaning and intent.

"'"'And said water company shall not be called upon to begin work until such properties shall have been conveyed to said water company, and until the title to the same shall have been examined and approved by the counsel of said water company. And said Coffin and Stanton shall hold themselves, personally and individually, liable for any damage which may accrue to said city by the failure of said water company to construct said water works and to convey the property of said water company to said City of Santa Cruz as hereinafter set forth. And said Coffin & Stanton do hereby guarantee the performance of all the acts of said water company herein specified. And it is hereby mutually agreed and made a part of this contract, that in the event of the failure of said Coffin & Stanton, or said water company, to perform their part of this contract, then said City of Santa Cruz shall be entitled to collect from said Coffin & Stanton the sum of fifty thousand dollars as liquidated damages, which sum actually represents the loss to said City of Santa Cruz, by the failure of said Coffin & Stanton, or said water company to perform their part of this contract. And said City of Santa Cruz agrees to enter into any further contracts or agreements with said Coffin & Stanton, or said water com-
354 pany, which may be necessary, effectually to carry out the spirit and intent of this contract.

"'"'In witness whereof, the respective parties to these presents have hereunto set their hands and seals, the day and year first hereinabove written.

"'"'CITY OF SANTA CRUZ,

"'"'By G. BOWMAN, *Mayor.*

"'"'[Seal of City of Santa Cruz.]

"'"'Attest: O. J. LINCOLN, *City Clerk.*'"'

"And, whereas, on the twenty-third day of September, 1889, said party of the first part entered into a further agreement with said Coffin & Stanton, which agreement is in the following words, to wit:

"'Memorandum of agreement in the matter of the sale of two hundred and seventy thousand dollars five per cent. bonds of the city of Santa Cruz, and in the matter of the purchase of water works by the said City of Santa Cruz.

"'Whereas, Coffin & Stanton have purchased two hundred and seventy thousand dollars five per cent. bonds of the city of Santa Cruz, and have entered into an agreement, under date of the sixteenth day of September, 1889, with the city of Santa Cruz, for the sale to said city of certain water works named therein. And whereas, it is desired that the proceeds of the sale of said bonds shall be used solely for the purpose of said works or the redemption of said bonds:

355 "'Now, therefore, it is agreed between the City of Santa Cruz and the said Coffin & Stanton that said city shall deposit with said Coffin & Stanton the sum of two hundred and forty-five thousand dollars of said proceeds, which sum shall be placed to the credit of said City of Santa Cruz on the books of said Coffin & Stanton, for the use of City Water Company of Santa Cruz, referred to in said contract of September 16, said Coffin & Stanton agreeing to use said fund to carry out the contract hereinbefore mentioned, or, in the event of the failure of said city to acquire said water works in accordance with said contract, then said fund shall be applied by said Coffin & Stanton to the retirement and redemption of the aforesaid mentioned two hundred and seventy thousand dollars five per cent. bonds of said city of Santa Cruz, and for the repayment to said city of any payments it may have made on said bonds; or said Coffin & Stanton and the individual members of said firm shall be personally liable for the full amount.

"'And it is hereby mutually agreed and made a part of this contract, that in the event of the failure of said Coffin & Stanton to perform their part of this, then said City of Santa Cruz shall be entitled to collect the sum of three hundred thousand dollars, as liquidated damages from the said firm of Coffin & Stanton or from any or all of the individual members thereof, namely, William Edward Coffin, Walter Stanton, Charles Hervey Jackson and Charles F. Street, all of the city and county and State of New York.

"'The aforesaid sum of three hundred thousand dollars
356 actually representing the loss to said City of Santa Cruz, from the failure of said Coffin & Stanton to perform their part of this contract. And it is further agreed that when the contracts for the construction of said water works are awarded, if they shall be awarded by said water company, that said Coffin & Stanton shall secure from such contractors good and sufficient bonds in amount of one hundred and fifty thousand dollars, which bonds shall be assigned and delivered to said City of Santa Cruz as additional security for the fulfillment of this agreement and of the contracts hereinbefore referred to.

"'In witness whereof, the respective parties to these presents have hereunto set their hands and seals this twenty-third day of September, 1889.

"'G. BOWMAN, [SEAL.]
"'*Mayor City of Santa Cruz.*
"'COFFIN & STANTON. [SEAL.]

"'Signed, sealed and delivered in the presence of—
"'[SEAL.] O. J. LINCOLN, *City Clerk.*'

"And, whereas, in pursuance of said two agreements, said party of the second part was organized under the corporate name of 'City Water Company of Santa Cruz:'

"Now, therefore, said party of the first part, for and in consideration of the premises, and of one dollar to it in hand paid by the party of the second part, does hereby grant, bargain, sell unto the said party of the second part, its successors or assigns, all the right,

title and interest of the party of the first part in and to the
357 waters of Laguna creek, in the county of Santa Cruz, State of California, and all the riparian rights pertaining to the lands bordering on said Laguna creek lying below the point in section 30, township 10, south range 2 west, Mount Diablo meridian, where the waters of said creek are to be taken and diverted for the purposes of the said City Water Company of Santa Cruz, and between said point of diversion and the Pacific ocean, that is to say, all such rights therein and thereto as the said party of the first part now has or may hereafter acquire. Also such easements and rights of way of every nature and description which have — acquired or which may hereafter be acquired by the party of the first part in connection with and for the purpose of conducting and introducing the waters of said Laguna creek into the said city of Santa Cruz. And also all lands and reservoir sites acquired or to be acquired by the party of the first part in connection with and for the purpose of the conducting of said water into said city, and also all rights and property of whatsoever kind or nature which the party of the first part now has or owns or which it may hereafter acquire for said purposes or in connection therewith.

"Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

"To have and to hold the said premises, together with the appurtenances unto the said party of the second part, its successors and assigns forever. Provided, however, and this grant is upon the expressed condition, that the said agreements hereinbefore set
358 forth are performed by said Coffin & Stanton and by said City Water Company strictly in accordance with the terms of said agreements; and in case of a violation of said agreements, or either of them by said Coffin and Stanton, or their assigns, or by said City Water Company, or its successors or assigns, then this grant shall be void and the property hereby conveyed shall revert to and revest in said party of the first part, its successors or assigns; and it is further provided that the payment or collection by suit or otherwise of the sums named in said agreements as liquidated damages, shall not in any manner affect or prevent such reverter and reversement nor validate this grant.

"In witness whereof, the party of the first part has caused these presents to be executed by its mayor under its corporate seal, the day and year first above written, by authority of an ordinance of its common council passed November 20, 1889.

"THE CITY OF SANTA CRUZ,
"By G. BOWMAN, *Mayor.*

"Signed, sealed and delivered in the presence of—
"Attest: O. J. LINCOLN.
"[CORPORATE SEAL.]

"Approved:
"W. D. STOREY,
"*City Attorney.*"

STATE OF CALIFORNIA, } ss:
City of Santa Cruz, }

On this twentieth day of November, A. D. 1899, before me, Ed. Martin, county clerk and *ex officio* clerk of the superior court
339 in and for said county, personally appeared G. Bowman, known to me to be the mayor of the City of Santa Cruz, the corporation that executed the annexed instrument, and he acknowledged to me that such corporation executed the same.

Witness my hand and official seal at said county the day and year last above written.

ED. MARTIN,
County Clerk and ex Officio Clerk of the Superior
[SEAL.] *Court in and for said County — Santa Cruz.*

Filed for record at the request of W. D. Storey, November 21, A. D. 1889, at 10 o'clock a. m., and recorded November 29, 1889.

STATE OF CALIFORNIA, } ss:
County of Santa Cruz, }

I, Ed. Martin, county clerk of the said county of Santa Cruz, State of California, and *ex officio* county recorder in and for said county, do hereby certify that I have compared the foregoing copy with the original record of the deed from the City of Santa Cruz to City Water Company of Santa Cruz, dated November 20, 1889, and of record in the office of said county recorder in vol. 71 of Deeds, at page 191 *et seq.*, and that the same is a full, true and correct transcript of such original record and of the whole thereof.

Attest my hand and the seal of said county recorder hereto affixed this first day of November, A. D. 1897.

ED. MARTIN,
County Recorder,
[SEAL.] By B. R. MARTIN,
Deputy Recorder.

340 O. J. LINCOLN, a witness on behalf of the defendant, testified:

That he was city clerk of the city of Santa Cruz from February, 1889, until 1896; that he was clerk of the city council of said city at the time of the adoption of ordinance No. 315, purporting to be an ordinance providing for notice to be given of a special election in the city of Santa Cruz, to be held March 13, 1894, for certain purposes therein specified.

The defendant then offered and read in evidence ordinance No. 192 of the mayor and common council of the city of Santa Cruz, entered on page 96 of Ordinance Book 93 of the city of Santa Cruz, which reads as follows:

An ordinance authorizing a conveyance by the city to the City Water Company of Santa Cruz of all the water rights, rights of way, and reservoir sites belonging or to belong to the city, in connection with its proposed water-works system, and directing the mayor to execute the same.

The mayor and common council of the city of Santa Cruz, State of California, do ordain as follows:

SECTION 1.

That in conformity with the two agreements entered into between the City of Santa Cruz and Coffin & Stanton, one dated September 16, 1889, and the other dated September 23, 1889, the said City of Santa Cruz do convey to the City Water Company of Santa Cruz, a corporation organized and existing under the laws of the State of California, and having its office and principal place of busi-
361 ness at the city and county of San Francisco, in said State, all the right, title and interest of said City of Santa Cruz in and to the waters of Laguna creek, in the county of Santa Cruz, in said State, and all the riparian rights pertaining to the land bordering on said Laguna creek, that is to say, all such rights as the city now has, or hereafter may acquire, in connection with and for the purposes of its proposed system of water works:

Also, all such easements and rights of way of any nature and description which have been acquired, or which may hereafter be acquired, in connection with and for the purpose of such system of water works:

And also, all lands and reservoir sites acquired or to be acquired in connection with and for the purpose of such system of water works, and also all rights and property of whatsoever kind and nature which the city now has, or which it may hereafter acquire, for said purposes, or in connection therewith.

SECTION 2.

That the mayor of the city be, and he is hereby authorized and directed to execute and deliver a proper deed of the same, said deed to be approved by the city attorney.

SECTION 3.

This ordinance shall take effect immediately upon its passage and approval.

Passed this twentieth day of November, 1889, by the following vote: Ayes, Councilmen Finkeldey, Willey, and Garrett; absent, Councilman Weeks.

362 Approved by me this twentieth day of November, 1889.

G. BOWMAN,
Mayor of the City of Santa Cruz.

Attest: O. J. LINCOLN,
[SEAL.] *City Clerk.*

Filed November 20, 1889.

O. J. LINCOLN, *City Clerk.*

The witness (Mr. Lincoln) continuing, states that he delivered the bonds in question in this suit to Mr. Walter Stanton, of the firm of Coffin & Stanton, on the twenty-fourth day of November, 1894; that said bonds were three hundred and sixty in number, and of the denomination of $1,000 each; and that no money or other consideration was received by the witness for or on account of the City of Santa Cruz, either on the delivery of such bonds to Mr. Stanton, or before or after such delivery; that the witness has no knowledge of any consideration ever being paid *in* the City of Santa Cruz for said bonds.

The witness was then shown a record on page two hundred and twenty-six of the minutes of the common council of the city of Santa Cruz, vol. 3, and stated that the entry was made by him. The defendant then offered and read in evidence such record, the same being the record of the contract executed by Coffin & Stanton to the City of Santa Cruz, which reads as follows:

"Upon motion, it was ordered, that the contract of Coffin & Stanton to refund the city's indebtedness, dated February 27, 1894, and accepted by the council April 16, 1894, be entered upon the minutes of the board, namely:

363 'The City of Santa Cruz, deciding to refund $225,000 in 5 per cent. water bonds, $89,000 in 6 per cent. mortgage bonds, $39,000 municipal improvement bonds, with accrued interest thereon, total $360,000, into $360,000 in 5 per (cent.) refunding bonds of the denomination of $1,000 each, legally issued under the act of the legislature of the State of California, approved March 1, 1893, advertising the sale of same, and in the event of the city not receiving satisfactory bids for such bonds at said sale, Coffin & Stanton agree to purchase said bonds at par and accrued interest, contracting with the city to assume all obligations of interest and principal on the bonds to be refunded, making the refunding an assured fact from the date of the sale and delivery of the bonds to them. The funds derived from the purchase of $360,000 in said bonds to be deposited with Coffin & Stanton to the credit of the City of Santa Cruz funding fund, and to be used to take up and refund the outstanding bonds as above mentioned, Coffin & Stanton forwarding same from time to time to the city for cancellation, charging such bonds to the funding fund at par (100) with interest to April 16 only. Coffin & Stanton also agree to surrender and deliver to the city all bonds of the City'"—"*to the city all bonds of the City* Water Company outstanding, over and above the $89,000 above mentioned, and to surrender and assign to and release said city from all claims and demands against said City of Santa Cruz under their contract with said city for construction of water works. In consideration of the above agreement, the city on its part agrees to pay Coffin & Stanton 3 per cent. of the par value of the refund-

ing bonds in the event of the city availing itself of its terms
364 on or before April 16, 1894. Coffin & Stanton further agree to prepare and furnish said city with the blank bonds and coupons thereto, at their own cost and expense.

Dated at Santa Cruz, February 27, 1894.

COFFIN & STANTON.

Witness to signature:
Z. N. GOLSBY.'"

W. E. A. JOHNSON, a witness called on behalf of defendant, testified as follows:

"I am deputy county clerk of the city and county of San Francisco, and recognize these papers now shown me. I brought them with me this morning from the files of the office of the county clerk of the city and county of San Francisco."

The defendant then offered and read in evidence one of the documents identified by the witness, the same being the articles of incorporation of the City Water Company of Santa Cruz, together with the record of filing, which said document was marked "Defendant's Exhibit F," and reads as follows:

DEFENDANT'S EXHIBIT "F."

Articles of Incorporation of the City Water Company of Santa Cruz.

Know all men by these presents: That we, the undersigned, a majority of whom are citizens and residents of the State of California, have this day voluntarily associated ourselves together for the purpose of forming a corporation under the laws of the State of California.

And we hereby certify:

365 First. That the name of said corporation shall be the City Water Company of Santa Cruz.

Second. That the purposes for which it is formed are:

To furnish, supply and sell water to the city of Santa Cruz, county of Santa Cruz, State of California, and the inhabitants thereof, to the county of Santa Cruz, in said State and inhabitants thereof, for all such uses and purposes as may be required by said city of Santa Cruz, and by said county of Santa Cruz, and by the inhabitants thereof respectively, to purchase, condemn, acquire and own water works, water, water rights, rights of way, easements, lands, tenements and hereditaments; to erect, construct, equip, lay down, maintain and own water works, buildings, reservoirs, water pipes, pipe lines, canals, ditches, flumes, conduits, roads, ways, bridges, telegraph and telephone lines; to enter into, make, receive, acquire and own contracts, agreements, franchises and privileges in relation to the supplying, furnishing and selling of water; to contract for the construction and equipment by said corporation of water works for others; also, to contract with others for the construction

and equipment of water works for said corporation; to contract, sell, and convey any and all of its water works, water rights, rights of way, easements, lands, tenements, hereditaments, buildings, reservoirs, water pipes, pipe lines, canals, ditches, flumes, conduits, roads, ways, bridges, telegraph and telephone lines; and to hypothecate, mortgage, pledge, and convey in trust the same or any part thereof, for the purpose of securing its bonds, promissory notes and obligations; to borrow money, and make, execute and deliver bonds, notes, mortgages, deeds of trust and obligations in
366 writing, for the purpose of securing the payment of moneys due, borrowed or owing by it, to buy, contract for and sell bonds, obligations, evidences of debt and securities; and to do and perform all the acts and things which may be necessary or convenient in carrying out the objects and purposes of this incorporation.

Third. That the place where the principal business of said corporation is to be transacted is the city and county of San Francisco, State of California.

Fourth. That the term for which said corporation is to exist is fifty years from and after the date of its incorporation.

Fifth. That the number of directors or trustees of said corporation shall be five, and that the names and residences of the directors or trustees who are appointed for the first year, and to serve until the election and qualification of such officers, are as follows, to wit:

Name.	Whose residence is at—
Charles B. Ludwig,	The city of New York, State of New York.
Charles Hervey Jackson,	The city of New York, State of New York.
Frederick R. King,	San Francisco, State of California.
E. H. Rixford,	San Francisco, State of California.
C. K. Bonestell,	San Francisco, State of California.

Sixth. That the amount of the capital stock of said corporation is five hundred thousand dollars, and the number of shares in which it is divided is five thousand, of the par value of one hundred dollars each.

367 Seventh. That the amount of said capital stock which has been actually subscribed is five hundred thousand dollars, and the following are the names of the persons by whom the same has been subscribed and the amount subscribed by each of them, to wit:

Names of subscribers.	No. of shares.	Amount.
Charles Hervey Jackson	1	$100.00
Charles B. Ludwig	4,996	499,600.00
Frederick R. King	1	100.00
E. H. Rixford	1	100.00
C. K. Bonestell	1	100.00

In witness whereof, we have hereunto set our hands and seals this twenty-sixth day of September, 1889.

CHARLES F. STREET. [SEAL.]
J. D. HALSEY. [SEAL.]
F. R. KING. [SEAL.]
E. H. RIXFORD. [SEAL.]
C. K. RONESTELL. [SEAL.]

Signed, sealed and delivered in the presence of—
—— ——.

CITY AND COUNTY OF SAN FRANCISCO, } ss:
State of California, }

On this twenty-seventh day of September, in the year one thousand eight hundred and eighty-nine, before me, Geo. C. Knox, notary public, duly commissioned and sworn, in and for said city and county, personally appeared Charles F. Street, Frederick R. King, E. H. Rixford, C. K. Bonestell, and James D. Halsey,
368 known to me to be the persons whose names are subscribed to and who executed the within instrument, and acknowledged to me that they executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year last above written.

[SEAL.] GEO. C. KNOX,
Notary Public.

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

I, Wm. A. Davies, county clerk of the city and county of San Francisco, State of California, do hereby certify the within to be a full, true and correct copy of articles of incorporation of the City Water Company of Santa Cruz, as the same remains on file in this office.

In witness whereof, I have hereunto set my hand and affixed my official seal this — day of ——, 1888.

—— ——, *Clerk,*
By —— ——,
Deputy Clerk.

(Endorsed:) Filed in the office of the county clerk of the city and county of San Francisco, State of California, this twenty-eighth day of September, A. D. 1889. Wm. A. Davies, county clerk, by John J. Harney, deputy clerk.

The defendant then offered and read in evidence the certificate of creation of bonded indebtedness of the City Water Company
369 of Santa Cruz, being the other document identified by the witness, which said certificate is marked "Defendant's Exhibit G," and reads as follows:

DEFENDANT'S EXHIBIT "G."

Certificate of Creation of Bonded Indebtedness to City Water Company.

We, F. R. King, president of the corporation hereinafter named, and E. H. Rixford, secretary of said corporation, the chairman and secretary of the stockholders' meeting hereinafter mentioned, and F. R. King, C. K. Bonestell, and E. H. Rixford, a majority of the directors of said corporation, do hereby certify as follows:

That at a regular meeting of the board of directors of the City Water Company of Santa Cruz, a corporation organized and existing under the laws of the State of California, and having its office and place of business at the city and county of San Francisco, in said State, duly and regularly convened and held at its office, room 8, No. 528 California street, in said city and county, on the thirty-first day of December, 1889, a resolution of which the following is a copy, was duly and regularly passed and adopted:

Resolved, That a meeting of the stockholders of this corporation be, and the same is hereby, called for the twenty-first day of April, 1890, at 11 o'clock a. m., at the office of the corporation, to consider the expediency of and vote upon the question of creating a bonded indebtedness of the corporation and issuing bonds of the corporation secured by mortgage, in the sum of $400,000, with interest at the rate of six per cent. per annum to pay for the construc-
370 tion and maintenance of the works of the corporation and the "Daily Evening Bulletin," a newspaper published in the city and county of San Francisco, State of California, is hereby designated as the newspaper in which shall be published the notice of such meeting."

That in pursuance of such resolution —, of which the following is a copy, was published in the "Daily Evening Bulletin," the newspaper mentioned in said resolution, once a week for more than sixty days, to wit, every Tuesday from and including the fourth day of February, 1890, to and including the fifteenth day of April, 1890:

City Water Company of Santa Cruz.

Location of principal place of business, city and county of San Francisco, State of California.

Notice is hereby given that a meeting of the stockholders of the City Water Company of Santa Cruz, a corporation, will be held at the office of the company, room 8, No. 528 California street, San Francisco, State of California, on the twenty-first day of April, 1890, at 11 o'clock a. m., for the purpose of considering the expediency of and of voting upon the question of creating a bonded indebtedness of the corporation and of issuing bonds of the corporation, secured by mortgage, in the sum of four hundred thousand dollars, bearing interest at the rate of six per cent. per annum, to pay for the construction and maintenance of the works of the corporation.

By order of the board of directors.

F. R. KING, *President.*
E. H. RIXFORD, *Secretary.*

371 That in addition to such notice by publication, the undersignedsecretary of such corporation did also address a copy of said notice to each of the stockholders of said corporation at his place of residence, and mailed the same to him, postage paid, on the sixth day of February, 1890.

That a meeting of the stockholders of said corporation was duly and regularly held at the said office of said corporation on the twenty-first day of April, 1890, at 11 o'clock a. m., in pursuance of said call and notice; that at such meeting a bonded indebtedness of four hundred thousand dollars was created, as appears from the following resolution of said stockholders; that at such meeting all the stock of the corporation, to wit, five thousand shares, was represented by the holders in person and by proxies in writing, and that at such meeting a resolution, of which the following is a copy, was duly and regularly adopted by a vote of the holders of all of the capital stock of said corporation, to wit:

Charles Hervey Jackson, holding..... ...	1 share.
(By written proxy to E. H. Rixford.)	
Charles B. Ludwig, holding....	2,996 shares.
(By written proxy to E. H. Rixford.)	
Frederick R. King.....	1 share.
E. H. Rixford.....	1 share.
C. K. Bonestell.....	1 share.
	5,000 shares.

And that all of said stockholders voted for said resolution, which is as follows:

First. Resolved, That for the purpose of procuring means to
372 construct, maintain, extend, and complete the water works of the company, and to pay all its indebtedness, et cetera, it is expedient and necessary for this company to borrow the sum of four hundred thousand dollars and to issue its bonds therefor, and to secure the payment of the same as authorized by law.

Second. Resolved, That the president be, and he is hereby, authorized to negotiate such loan, and for that purpose to make and execute a series of bonds of the company, four hundred in number, and each for the sum of one thousand dollars, and numbered from one to four hundred, all bearing date the first day of May, A. D. 1890, and payable to the Holland Trust Company of New York, trustee, or bearer, on the first day of May, A. D. 1910, or at such times as its sinking fund hereafter to be established shall be able to redeem said bonds, said bonds to be redeemed at par according to number, beginning at the lowest, with interest from this date at the rate of six per cent. per annum, payable semi-annually on the first days of May and November in each year, according to coupons to be attached thereto, both principal and interest to be payable in the city of New York in gold coin of the United States of the present standard of weight and fineness, and also to secure the pay-

ment of said bonds and the interest thereon by a pledge of the property and income of this company.

Third. Resolved, That the said bonds shall be substantially in the form following, to wit:

373 No. —. $1,000.

UNITED STATES OF AMERICA, *State of California.*

The City Water Company of Santa Cruz Six per Cent. First-mortgage Gold Bond.

Total issue, $400,000.

The City Water Company of Santa Cruz, a corporation of the State of California hereby acknowledges itself to owe to the Holland Trust Company, of New York, trustee, or bearer, one thousand dollars, which it promises to pay to the bearer hereof at the office of said The Holland Trust Company of New York, in the city of New York, in lawful gold coin of the United States of America, of the present standard of weight and fineness, on the first day of May, in the year one thousand nine hundred and ten, except as hereinafter provided, with interest thereon from and after the date hereof, at the rate of six per centum per annum, payable in like gold coin, semi-annually, at the office of said The Holland Trust Company, on the first days of May and November in each year, upon the surrender of annexed coupons therefor, until the principal sum shall be fully paid.

This is one of a series of four hundred bonds issued by this company, numbered one to four hundred, inclusive, each of which is for the sum of one thousand dollars, all bearing the same date with this bond, and in all respects of the same tenor and effect, and the payment of which both principal and interest, is secured by the mortgage of said company to said The Holland Trust Company,

of New York, trustee, of even date herewith, on all the real
374 property, machinery, engines, houses, pumps, wells, reservoirs, stand pipes, mains, and water-plant fixtures of said company, and on all its equipment and other property, real and personal, connected with or appurtenant to said water works, or used or provided for the operation and maintenance thereof, now owned or hereafter acquired, together with all the rights and franchises of said company thereunto appertaining, and said bonds are subject to the provisions of said mortgage executed and delivered to said The Holland Trust Company, of New York, and recorded, to which reference is made for the provisions thereof and the full conditions hereof. Said bonds may be redeemed whenever the sinking fund is sufficient therefor, at par, according to numbers of said bonds, beginning with the lowest number.

Upon default in the payment of any installment of interest of this bond for sixty days after such installment shall become due and payable, the principal hereof shall thereupon become due and payable, upon the condition and in the manner and with the effect as provided and set forth in the said mortgage or deed of trust.

It is agreed between the said City Water Company of Santa Cruz and the holder of this bond that, in case of default in the payment of the principal or interest thereof the said company will waive, and does hereby waive, the benefit of any extension, stay, redemption, or appraisement laws, now existing, or which may hereafter be enacted.

This bond shall not become obligatory until the certificate endorsed hereon is duly signed by the trustee.

375 In witness whereof the said The City Water Company of Santa Cruz has caused its corporate seal to be hereunto affixed, and this bond to be subscribed and attested by its president and secretary on this first day of May, in the year eighteen hundred and ninety.

CITY WATER COMPANY OF SANTA CRUZ,
By F. R. KING, *President.*

Attest: E. H. RIXFORD, *Secretary.* [SEAL.]

$30. *Form of Coupon.* $30.

On the first day of ——, the City Water Company, of Santa Cruz, will pay the bearer hereof thirty dollars, at the Holland Trust Company, of New York, in the city of New York, being six months' interest on the first-mortgage bond No. —.

F. R. KING, *President.*

E. H. RIXFORD, *Secretary.*

The interest coupons attached to all of said bonds shall be authenticated and evidenced by the signatures of the president and secretary of the company engraved thereon, which shall be regarded and treated as in all respects, in fact and in law, equivalent to a manual signing thereof.

Fourth. Resolved, That the pledge of the property and income of this company to secure the payment of said bonds and the interest thereon shall be in the form of a mortgage or deed of trust, and to that end this company will make, execute, and deliver to the

376 Holland Trust Company, of New York, trustee, a mortgage deed upon all and singular the franchises, rights of way, and privileges granted to said water works company, all the real estate, houses, pumps, machinery, reservoirs, stand pipes, hydrants, and all main and distributing pipes; also all buildings, plant, machinery, fixtures, and appurtenances and privileges for supplying the citizens of said city of Santa Cruz and the vicinity thereof with water, and all other property now owned or that may be hereafter acquired by said company, including all rents of hydrants and incomes from water rents, and all revenues or emoluments of said company derived from said water works, by such pertinent description in general and in detail as the president of this company may approve and have incorporated in said mortgage.

Such mortgage, when recorded, shall be a lien upon all the property of this company, including all rights, privileges, franchises,

tolls, income, rights of way, leases, grants, liens, equipment, and all the other property, real and personal, of said company, now owned or which may hereafter be acquired, as fully as the same may be set forth therein, and shall be in trust for the equal benefit and security of the holders of said bonds, without preference, priority, or distinction as to lien or otherwise, so that each of them shall have the same rights, lien, privilege, and security, as though they had all been executed, issued, and delivered simultaneously with the execution and delivery of this mortgage, and said mortgage shall provide that a sinking fund to redeem said bonds shall be established by this company after five years from the date of said mortgage,
377 by paying annually to the said Holland Trust Company of New York, as trustee, two per centum of the amount of bonds secured by said mortgage; and if all of said bonds be not issued at said time, then two per centum of the amount then outstanding, and such mortgage may also contain such other terms, provisions, restrictions, and limitations as the president of this company may approve and have incorporated therein.

Fifth. Resolved, That none of said bonds shall be issued, or be entitled to the benefit of the security of said mortgage, or be in anywise obligatory upon this company as evidence of debt or otherwise, unless or until the said Holland Trust Company of New York, as such trustee, or its successor or successors in such trust, shall have authenticated the same as being so issued and secured by signing a certificate endorsed thereon substantially in the form following, to wit:

"The Holland Trust Company, of New York, hereby certifies that this bond is one of a series of bonds amounting in the aggregate to four hundred thousand dollars, mentioned in the mortgage referred to within.

HOLLAND TRUST COMPANY OF NEW YORK, *Trustee.*

(Signed) ——— ———, *President.*"

Sixth. Resolved, That the president and secretary be and they are hereby authorized and empowered, for and on behalf of this company, to execute each of said bonds by affixing thereto its name and corporate seal, attested by the secretary, and by signing the
378 same as such president, and, when so executed, to deliver the same to said trustee for authentication as aforesaid; and also to make and execute the said mortgage or deed of trust under the corporate name of this company, subscribed by the president, with the corporate seal thereto attached, attested by the secretary, and to acknowledge the same as required by law, and when so acknowledged, the same shall be delivered to said trustee, and duly recorded.

That the undersigned, F. R. King, president of the corporation, was the chairman of said meeting, and the undersigned, E. H. Rixford, secretary of the corporation, was the secretery of said meeting, and that the undersigned directors are a majority of the directors of said corporation.

That at all the times in this certificate stated, F. R. King, C. K.

Bonestell, Chas. B. Ludwig, Chas. Hervey Jackson, and E. H. Rixford, were, and now are, the directors of said corporation.

In witness whereof, the said chairman and secretary of said stockholders' meeting, and the majority of the directors of said corporation, have hereunto signed their names and caused the seal of the corporation to be hereunto affixed, this first day of May, 1890.

F. R. KING,
President and Chairman.

[CORPORATE SEAL.]

E. H. RIXFORD, *Secretary.*
C. K. BONESTELL,
F. R. KING,
E. H. RIXFORD, *Directors.*

379 (Endorsed:) Certificate of creation of bonded indebtedness to the City Water Company of Santa Cruz. Filed in the office of the county clerk of the city and county of San Francisco, State of California, this twenty-fourth day of June, A. D. 1890. Wm. A. Davies, county clerk, by John H. Harney, deputy clerk.

O. J. LINCOLN, recalled on behalf of the defendant, testified as follows: That he advertised the refunding bonds here in question for sale after the adoption of what is known as ordinance No. 320 of the city of Santa Cruz, in the "Santa Cruz Surf," the "Santa Cruz Sentinel," and the "San Francisco Chronicle;" that no bids were received by the witness as city clerk, nor by the city for the refunding bonds after the first publication of the notice calling for bids, neither orally nor in writing; that he had in his possession, on the twenty-third of April, 1894, the instrument referred to in the minutes of April 16, 1894, as the proposition of Coffin & Stanton, dated February 22, 1894, to refund the city's indebtedness; that the record of said proposition or contract on pp. 226 and 227 of the Minutes of the Common Council of the City of Santa Cruz is in his handwriting.

The witness was then shown a document signed "Coffin & Stanton witness to signature, Z. N. Goldsby; dated at San Francisco, February 27, 1894," marked "Filed April 16, 1894, O. J. Lincoln, city clerk," and purported to be an agreement on behalf of Coffin & Stanton to purchase $360,000 worth of five per cent. refunding bonds of the denomination of $1,000 each to be issued by the city of Santa Cruz; and then stated that he had compared the first
380 page of the document shown him with the record that he made of the original contract, and that the same do not agree; that he recognized the last page and the file-mark of a document shown him as the last page and file-mark of the original proposition of Coffin & Stanton, referred to in the minutes; that the first page of a document shown him, purporting to be the original contract, does not correspond with the record; that the document so shown him is not the original contract or proposition referred to in the minutes as the proposition of Coffin & Stanton and recorded in the minutes; that during witness's incumbency of the office of city clerk, there was no other contract purporting to be the original contract or proposition of Coffin & Stanton among the files of the city

clerk; that the original proposition was filed as presented by Coffin & Stanton in February, 1894; and that witness presumed that it had remained on file ever since that time; that said original proposition was not in the possession of witness between the twenty-seventh of February, 1894, and the sixteenth of April, 1894, but that it was witness's recollection that it was in the hands of Mr. Goldsby, the city attorney; that it first came into witness's possession as city clerk of the city of Santa Cruz on the date of its filing, sixteenth of April, 1894, and was recorded on the twenty-fourth, the *day after the meeting of April 23, 1894; that so far as witness* knows, the said original contract remained in his custody as city clerk until he turned over the papers to his successor; that witness had no recollection of said original contract being taken out of the office at any time; that he had not delivered to nor authorized
381 any one to take the original contract from the files between the sixteenth day of April, 1894, and the time he went out of office; that during said period witness sent no original papers to Coffin & Stanton and that, so far as he was concerned, witness had no knowledge as to the change or the time of the change, or how the change was made, in the original contract. (The purported contract shown witness is now marked for identification, "W. B. B.")

It is now admitted by plaintiff that on the ninth of April, 1894, at an election duly held in the city of Santa Cruz, Robert Effey was elected mayor, Henry G. Insel, John Howard Bailey, John D. Maher, and Frank K. Roberts were elected councilmen of the city of Santa Cruz for the ensuing term, and that Mr. Bailey qualified on the twelfth of April, 1894, Mr. Maher on the thirteenth of April, 1894, and Mr. Roberts on the twelfth of April, 1894.

Mr. Lincoln then continued: "H. G. Insel took the oath of office on the sixteenth day of April, 1894, somewhere between 8 a. m. and 5 p. m. It was before 5 o'clock of the afternoon of that day. The oaths of office were all filed when executed before me." (The witness, O. J. Lincoln, was then temporarily withdrawn.)

ROBERT EFFEY, a witness on behalf of the defendant, testified as follows:

That he was elected mayor of the city of Santa Cruz at the charter election of 1894; that at that time he knew Mr. Walter Stanton, of the firm of Coffin & Stanton, of New York; that Mr. Coffin was in the city of Santa Cruz in the month of April, 1894; that he remembers the circumstance of Walter Stanton having in his pos-
382 session a refunding bond issue of 1894; that Walter Stanton left the city of Santa Cruz on the twenty-fourth or twenty-fifth day of April, 1894; that he saw Mr. Stanton in San Francisco in either April, June or July of 1894.

The witness is now shown the document purporting to be the agreement of Coffin & Stanton to purchase $270,000 refunding bonds of the city of Santa Cruz, and marked "filed April 16, 1894, O. J. Lincoln, city clerk," and stated that he had seen such document before; that he had the document in his possession after it was filed

on April 16, 1894; that he had it several times in the city clerk's office for the purpose of looking at it; and that he brought it up once to San Francisco to show Mr. Walter Stanton, at his request, at the time Mr. Walter Stanton was in San Francisco, in June 1894; that it was either June or April, but he thought it was June; that at the time, Mr. Stanton was at the Occidental hotel in San Francisco; that Mr. Stanton had the document in his possession a few hours—maybe over night; that witness was not with Mr. Stanton all the time that Mr. Stanton had the contract in his possession; that Mr. Stanton finally returned the document to the witness. Witness does not know, and did not know, whether it was in the same condition when it was returned to him as when he handed it to Mr. Stanton, but witness thought it was until lately; that he made no examination of it critically at the time to ascertain whether or not it was in the same condition; that he returned it to the city clerk when he got home again; that he had no knowledge at any time of a change being made in the original contract—the substitution of the first page.

383 On cross-examination the witness stated: I gave that contract to Mr. Walter Stanton after April 23, 1894. The name of H. E. McKinney & Son is printed on the two pages of the instrument I hold in my hand. I know them. They are searchers of records, and live at Santa Cruz. They have no office in San Francisco. During the time that document was in the possession of Mr. Stanton, he had no opportunity of having another page, a first page of the contract, drawn in the office of H. E. McKinney & Son on their stamped paper. The contract was not in his possession long enough for him to go from San Francisco to Santa Cruz, and neither Mr. McKinney nor his son was in San Francisco during that time, to my knowledge.

O. J. LINCOLN was then recalled and testified on behalf of defendant as follows:

That after the first of July, 1894, he made and forwarded to Coffin & Stanton several copies of the ordinances of the city of Santa Cruz, and some other papers; that he could not recall to mind whether said contract or proposition of Coffin & Stanton to purchase $270,000 bonds of the city of Santa Cruz was among such papers, but that possibly it was; that he received a letter from Coffin & Stanton asking for certified copies of certain papers. He could not remember whether the contract was included among them. That such letter had been lost, and that he had not been able to find it, and that he did not remember sending a certified copy of the record of the contract.

On cross-examination the witness testified: That when he copied the instrument then on file, purporting to be an offer from
384 Coffin & Stanton to the city into the record book, he could not recall whether he was alone or not; that at that time he had no assistance in copying documents; that he had sometimes made clerical mistakes in making copies; that there might have been some slight clerical errors made in copying the original con-

tract into the record; that the representations appearing in such record did not occur in the original contract; and that such representations were errors; that he had examined the document purporting to be the original contract or offer of Coffin & Stanton prior to his testimony in this case, with the idea of determining what the differences are.

The witness was then asked to compare the purported contract with the record made by him of the original contract, and to point out such sentences that he was positive were not in the paper that was transcribed by him in the record.

By Mr. THOMAS:

Q. In the record appears what *that* you desire to call the attention of the court to? Read aloud the words.

The WITNESS (reading from the record book): "Funds derived from the purchase of the $360,000 of said bonds to be deposited with Coffin & Stanton, to the credit of the funding fund, and to be used to take up and refund the outstanding bonds above mentioned. Coffin & Stanton forwarding same from time to time to the city for cancellation, charging such bonds to the funding fund at par (100) with interest to April 16, only."

Mr. THOMAS: Now, read the alternative of that in the contract.

The WITNESS (reading from purported contract): "The
385 funds derived from the purchase of $360,000 of said bonds to be deposited with Coffin & Stanton, to the credit of the city of Santa Cruz funding fund, against which shall be charged all outstanding bonds as above mentioned taken up and refunded by said Coffin & Stanton, and when so taken up and refunded, they may be cancelled by them and forwarded by express to the treasurer of the city of Santa Cruz for further cancellation. Such cancelled bonds shall be charged against said fund at par (100) with interest to April 16 only."

The witness further testified that he was very positive that the clause he had just read from the paper shown him was not in the contract that he copied; that there were no other material differences in the two contracts; that he knew the names printed on the two sheets of the purported tract, H. E. McKinney & Son; that H. E. McKinney & Son are residents of Santa Cruz and searchers of records there, and citizens in good standing.

J. L. WRIGHT, a witness on behalf of the defendant, testified as follows:

That he lives at Santa Cruz, and that he is the city clerk of that city, and had been acting in that capacity since the first of May, 1896, succeeding Mr. J. O. Lincoln, the gentleman who had just left the stand. The witness was then shown the document purporting to be the agreement of Coffin & Stanton, and marked "Filed April 16, 1894, O. J. Lincoln, city clerk," and testified: That since he assumed the office of city clerk of the city of Santa Cruz, said docu-
ment had been in his possession continuously; that there is
386 no other document or paper or instrument on file in the office of the city clerk of the city of Santa Cruz, purporting

to be an agreement between the city of Santa Cruz and Coffin & Stanton, or *vice versa*, dated February 27, 1894, and filed April 16, 1894; that he had made careful examination and comparison of the first and second pages of the instrument or document shown him; that the two sheets of which said document consists are ruled in red ink (printed), and that the red lines on the first page are wider apart nearly a quarter of an inch than those of the second page, but there are certain breaks or marks, separations, in the red lines on the one page and not on the other; that there is quite a perceptible difference in the shade of the ink on the two pages; that both are green, but one considerably lighter than the other; that he had examined and measured the top of the letters on both pages, and had discovered some differences between certain letters and characters occurring on one page, and the same letters and characters occurring on the other page; that the typewriter who wrote the first page used the small letter "l" to represent the figure one each time that it appears on such page, and that, with reference to the second page, the figure one appears three times, and the typewriter who wrote the second page used, in making the figure one, the capital letter "I" each time; and it is a fact that some typewriters use a small letter "l" in making the figure one, and others a capital "I;" and that there is also quite a difference in the appearance of the paper; one is a heavier paper than the other, although both have the same stamp of McKinney & Son, searchers of records.

387 The document purporting to be an agreement or proposition of Coffin & Stanton was then offered and read in evidence by the defendant, marked "Defendant's Exhibit I," and is as follows:

DEFENDANT'S EXHIBIT "I."

Agreement, Coffin & Stanton.

The City of Santa Cruz, deciding to refund $225,000 in 5 per cent. water bonds, $89,000 in 6 per cent. mortgage bonds, $39,000 in municipal improvement bonds, with accrued interest thereon, total, $360,000, into $360,000 in 5 per cent. refunding bonds of the denomination of $1,000 each, legally issued under the act of the legislature of the State of California, approved March 1, 1893, advertising the sale of same, and, in the event of the city not receiving satisfactory bids for such bonds at said sale, Coffin & Stanton agree to purchase said bonds at par and accrued interest, contract with the city to assume all obligations of interest and principal on the bonds to be refunded, making the refunding an assured fact from the date of the sale and delivery of the bonds to them. The funds derived from the purchase of $360,000 in said bonds to be deposited with Coffin & Stanton to the credit of the City of Santa Cruz funding fund, against which shall be charged all outstanding bonds as above mentioned, taken up and refunded, by said Coffin & Stanton, and when so taken up and refunded, they may be canceled by them and forwarded by express to the treasurer of the city of Santa Cruz

for further cancellation. Such cancelled bonds shall be charged against said fund at par (100), with interest to April 16 only.

388 Coffin & Stanton also agree to surrender and deliver to the city all bonds of the City Water Company outstanding, over and above the $89,000 above mentioned, and to surrender and assign to and release said city from all claims and demands against said City of Santa Cruz under their contract with the said city for construction of water works.

In consideration of the above agreement, the city on its part agrees to pay Coffin & Stanton 3 per cent. on the par value of the refunding bonds in the event of the city availing itself of its terms on or before April 16, 1894.

Coffin & Stanton further agree to prepare and furnish said city with the blank bonds and coupons thereto at their own cost and expense.

Dated at Santa Cruz, February 27, 1894.

COFFIN & STANTON.

Witness to signature:
Z. N. GOLDSBY.

(Stamped at the bottom, "H. E. Makinney & Son, searchers of records, notaries public and conveyancers, Santa Cruz, Cal.")

On cross-examination the witness Wright testified as follows: That he had lived in Santa Cruz six years; that he knew the firm of H. E. McKinney & Son; that their office was at No. 4 Cooper street, Santa Cruz, and consisted of two rooms; that witness thought that McKinney & Son had two typewriting machines in their office; that he had not noticed their stock of paper to see if they had bought it all at the same place and the same time; that they

389 may have had two machines; that they may have had a stock of paper which they purchased at different times, of different weights and different widths of ruling.

The defendant then offered and read in evidence ordinance No. 156 of the city of Santa Cruz, determining that the city shall acquire water works, which said ordinance reads as follows:

Ordinance No. 156.

"Ordinance No. 156.—An ordinance determining the public necessity for the acquisition, construction and completion of a permanent system of water works and water rights for the use of the city of Santa Cruz.

The mayor and common council of the city of Santa Cruz do ordain as follows, viz:

SECTION 1. It is hereby determined and declared that the public interest and necessity of the city of Santa Cruz demand the acquisition, construction and completion of a permanent system of water works for said city, including the usual and necessary structures, aqueducts, pipes, machinery and reservoirs for the same, and connected with its use, and of permanent water rights therefor, and

such acquisition, construction and completion are hereby declared to be a public necessity for the city of Santa Cruz. It is hereby determined and declared that the cost of the acquisition, construction, and completion of the said system of water works and of said water rights is too great to be paid for out of the ordinary annual income and revenue of said city of Santa Cruz.

SECTION 2. This ordinance shall be in force from and after its passage and approval.

390 SECTION 3. The clerk is hereby directed to cause this ordinance to be published for two weeks in the Santa Cruz 'Daily Sentinel,' a newspaper published in said city of Santa Cruz.

Passed on this second day of July, 1888, by the following votes: Ayes, Councilmen W. Finkeldey, H. Willey, E. H. Garrett, and C. W. Platt.

Approved —— 2, 1888.

G. BOWMAN,
Mayor of the City of Santa Cruz.

Attest: W. H. BIAS, *City Clerk.*"

The defendant then offered and read in evidence ordinance No. 157 of the city of Santa Cruz, calling a special election on the question of constructing and acquiring water works, which said ordinance reads as follows:

Ordinance No. 157.

"Ordinance No. 157.—An ordinance calling a special election and submitting to the qualified voters of the city of Santa Cruz the proposition for incurring a debt for the acquisition, construction, and completion of a permanent system of water works and water rights for the use of the city of Santa Cruz.

Whereas, the mayor and common council of the city of Santa Cruz did, on the second day of July, 1888, pass an ordinance (No. 156) by which they determined and declared that the public interest and necessity of the city of Santa Cruz demand the acquisition, construction and completion of a permanent system of water
391 works for said city, including the usual and necessary structures, aqueducts, pipes, machinery and reservoirs for the same, and connected with its use, and of permanent water rights therefor, and did also in said ordinance determine and declare that the cost of the acquisition, construction and completion of said system of water works, and of said water rights, is too great to be paid for out of the ordinary income and revenue of the said city of Santa Cruz. Whereas, the said ordinance was thereafter published for two weeks in the Santa Cruz 'Daily Sentinel,' a newspaper published in said city of Santa Cruz:

Now, therefore, the mayor and common council of the city of Santa Cruz do ordain as follows, to wit:

SECTION 1. A special election in and for the city of Santa Cruz is hereby called to be held in said city, at which there shall be sub-

mitted to the qualified voters of the said city of Santa Cruz a proposition for incurring an indebtedness by said city of the sum of three hundred thousand dollars, for the purposes set forth in said ordinance No. 156.

SECTION 2. The object and purpose for which the said investment is proposed to be incurred is the acquisition, construction and completion of a permanent system of water works for said city of Santa Cruz, including the usual and necessary structures, aqueducts, pipes, machinery and reservoirs for the same, and connected with its use, and of permanent water rights therefor. The estimated cost of the acquisition, construction, and completion of such improvement is three hundred thousand dollars. It is hereby determined and
392 declared that, for the purpose of supplying the inhabitants of the city of Santa Cruz with pure water at reasonable rates, and that the said city may itself be enabled to furnish its inhabitants with water sufficient for their requirements, there is a necessity for such improvement, and for the acquisition, construction and completion of the said system of water works, including the usual and necessary structures, aqueducts, pipes, machinery and reservoirs for the same, and connected with its use, and of permanent water rights therefor, and that the acquisition, construction and completion thereof is a public necessity.

It is further determined and declared that the cost of said improvement is too great to be paid out of the ordinary income and revenue of the city of Santa Cruz, and also that if the proposition of incurring said indebtedness for said purpose be accepted by the qualified voters of said city, as provided by the statute, bonds of the city of Santa Cruz for said municipal improvements shall issue for the payment of the cost thereof, to wit: in the amount of three hundred thousand dollars.

Said bonds shall be of the character known as serials, and shall be payable in the manner following, one-twentieth part of the whole amount of said indebtedness, together with annual interest at the rate of five (5) per cent. per annum on all unpaid sums thereof, shall be payable each and every year on a day to be fixed by the mayor and common council of said city until the whole amount of such indebtedness is paid.

SECTION 3. The election hereby called shall be held on Thursday, the sixth day of September, A. D. 1888, and the polls for said election shall be opened at nine o'clock a. m. and shall not
393 be closed until sundown of the same day. The places of voting in the different parts of the city and the officers of said election shall be the following: First ward, polling place, city hall; inspector, L. Curtis; judges, C. N. Davis, C. D. Holbrook. Second ward, polling place, Anthony block; inspector, Henry Keyn; judges, L. Schwartz, E. Anthony. Third ward, polling place, Duncan block; inspector, S. A. Bartlett; judges, M. O. Boyle, O. J. Lincoln. Fourth ward, polling place, Bay View school-house; inspector, W. H. Mason; judges, C. P. Holley, J. B. Harris. The officers of election aforesaid shall appoint two clerks of election for their respective polls, and the said inspectors, judges and clerks shall, prior to entering on

their respective duties, each take the oath of office prescribed by law for the inspectors, judges and clerks of State and county elections. In case any of the officers of election above designated shall fail to attend, those attending with the electors assembled, shall fill their places by appointing other competent persons from among the qualified electors present. All returns of said election shall be made out and signed by the officers of said election in the usual form, and deposited with the city clerk. No person shall be entitled to vote at said election unless he be an elector for State and county officers, and shall actually have resided within the ward in which he claims his vote thirty days next preceding said election.

SECTION 4. The ballots to be used at said election shall be of the same character as those used at the municipal elections, but must have the following caption and heading setting forth the
394 proposition to be voted upon, viz: Proposition for a municipal indebtedness of three hundred thousand dollars for the acquisition, construction and completion of a permanent system of water works, and of permanent water rights therefor. There shall be a space of two inches above and two inches below the said caption and heading, and a margin half an inch wide at the left of the printing on the balance.

SECTION 5. Voters of said election, desiring to accept the proposition set forth in this ordinance, shall, before voting, have written or printed on the ballot under said proposition the words, "For the indebtedness." Voters at said election desiring to reject said proposition must, before voting, have written or printed on said ballot, under said proposition, the words "Against the indebtedness."

SECTION 6. This ordinance shall take effect and be in force from and after its passage and approval.

SECTION 7. The city clerk is hereby directed to cause this ordinance to be published once a week for two weeks in the Santa Cruz 'Daily Surf,' a newspaper published in said city of Santa Cruz; passed August 6, 1888, by the following vote: Ayes, Councilmen W. Finkeldey, H. Willey, E. H. Garrett and C. W. Piatt. Approved August 6, 1888.

GUSTAVUS BOWMAN,
Mayor of the City of Santa Cruz.

Attest: W. H. BIAS, *City Clerk.*"

The defendant then offered and read in evidence ordinance
395 No. 164 of the city of Santa Cruz, declaring the result of the special election determining the proposition of incurring indebtedness, which said ordinance reads as follows:

Ordinance No. 164.

"Ordinance 164.—An ordinance declaring the result of the special election determining the proposition of incurring indebtedness, held September 6, 1888.

The mayor and common council of the city of Santa Cruz do hereby ordain as follows:

SECTION 1. The special election called by ordinance No. 157 of the city of Santa Cruz, passed and approved August 6, 1888, having been held at the time fixed, and by the officers appointed in and by said ordinance, and pursuant to the notice thereof, given as required by said ordinance and by ordinance No. 159 of said city, and by the law, and the returns of said election having been duly returned and filed with the city clerk, by the proper boards and officers of said election, which returns have been duly opened and canvassed by the mayor and common council sitting as a canvassing board of said election, and from which returns and a canvass thereof, it appears that the whole number of votes cast at said election was 759; that the following vote was cast to incur indebtedness and against such proposition, to wit: 'Proposition for a municipal indebtedness of three hundred thousand dollars for the acquisition, construction and completion of a permanent system of water works and of permanent water rights therefor.' 'For the indebtedness,' receiving 735 votes; 'Against the indebtedness,' received 22 votes;
396 scattering, 2 votes. And it also appearing that upon the said proposition submitted, the affirmative for incurring the indebtedness received more than two-thirds of the votes cast by the voters at said election, and said indebtedness as proposed was thereby authorized, it is therefore ordained and declared that the proposition of incurring an indebtedness of three hundred thousand dollars on behalf of said city for the acquisition, construction and completion of a permanent system of water works for said city, including the usual and necessary structures, aqueducts, pipes, machinery, and reservoirs for the same, and connected with its use, and of permanent water rights therefor, having received the requisite two-thirds of the votes cast at said election, said indebtedness and the issue of bonds therefor are declared to be authorized, and the city of Santa Cruz thereby authorized to incur a debt of three hundred thousand dollars for the purpose named, and to issue its bonds according to law as evidence of such indebtedness.

SECTION 2. This ordinance shall take effect and be in force from and after its passage and approval.

Passed this seventh day of September, 1888, by the following vote: Ayes, Councilmen Finkeldey, Willey, Garrett and Piatt.

Approved this seventh day of September, A. D. 1888.

G. BOWMAN,
Mayor of the City of Santa Cruz.

Attest: W. H. BIAS, *City Clerk.*"

397 The defendant then offered and read in evidence ordinance No. 168 of said city of Santa Cruz, providing for the issuance and sale of bonds, which said ordinance reads as follows:

Ordinance No. 168.

"Ordinance No. 168.—An ordinance to provide for the issuance and sale of bonds of the city of Santa Cruz.

Whereas, an indebtedness of three hundred thousand dollars has been authorized on behalf of the city of Santa Cruz by the electors thereof at a special election held September 6, 1888, pursuant to the provisions of the act of the legislature of the State of California, entitled 'An act authorizing the incurring of indebtedness by cities, town- or municipal corporations incorporated under the laws of this State, approved March 15, 1887,' and in accordance with the ordinance of said city No. 157, entitled 'An ordinance calling a special election and submitting to the qualified voters of the city of Santa Cruz the proposition for incurring a debt for the acquisition, construction and completion of a permanent system of water works and of water rights for the use of the city of Santa Cruz,' passed and approved August 6, 1888, and thereby bonds of the city of Santa Cruz for the amount of said indebtedness of the character specified and provided in said act and in the notice of such special election have been authorized to be issued by the city of Santa Cruz for the purposes in said ordinance named:

Now, therefore, the mayor and common council of the city of Santa Cruz do ordain as follows, to wit:

SECTION 1. There shall be issued by the city of Santa Cruz
398 six hundred bonds of the denomination of five hundred dollars each, bearing interest at the rate of five per cent. per annum, payable annually; said bonds shall be numbered consecutively from 1 to 600, both inclusive, and shall be divided in twenty series, to be numbered consecutively from 1 to 20, both inclusive, and consisting of thirty bonds each. The first series shall include those bonds which are numbered from 1 to 30, both inclusive, and each succeeding series shall include the thirty bonds which are numbered consecutively after those included in the next preceding series.

The bonds included in the first of said series shall be made payable on the tenth day of January, A. D. 1890, and one of the remaining series shall be made payable on the tenth day of January in each succeeding calendar year thereafter until and including the year 1909.

Said bonds shall be made payable to the order of the purchaser or payee by name, and shall bear date January 15, 1890, and shall be signed by the mayor and the city clerk, and shall have affixed thereto the seal of the city of Santa Cruz.

To each of said bonds there shall be attached interest coupons equal in number to the number of years which the bonds has to run before its maturity; each of said coupons shall represent a year's interest upon the principal amount of the bond at the rate of five

per cent. per annum, viz., twenty-five dollars, and shall be payable on the tenth day of January in each calendar year. Each coupon shall be made payable to the bearer, and must bear the signature of the mayor and city clerk.

Said bonds shall be substantially in the following form:

399 *Bond of the City of Santa Cruz.*

No. —. Series —. $500.

Municipal Improvement Fund No. 5.

'The City of Santa Cruz, a municipal corporation in the county of Santa Cruz, State of California, for value received, will pay to —— ——, or order, at the office of its city treasurer in said city of Santa Cruz, on the tenth day of January in the year —, the sum of five hundred dollars gold coin of the United States, with interest thereon at the rate of five per cent. per annum. Said interest to be paid annually in like gold coin on the tenth day of January of each calendar year from the date hereof until the maturity of said bonds at the office of the city treasurer of said city of Santa Cruz on presentation and surrender of the proper interest-bearing coupon hereto attached.

This bond is issued by the mayor and common council of the city of Santa Cruz under the provisions of an act of the legislature of the State of California, entitled "An act authorizing the incurring of indebtedness by cities, towns, or municipal corporations incorporated under the laws of this State, approved March 15, 1887," and pursuant to a vote and election given and held in said city under the provisions of said act on the sixth day of September, 1888. This bond ceases to bear interest when due, unless presented for payment.

In testimony whereof, the said City of Santa Cruz, by its mayor and common council, has caused this bond to be signed by
400 the mayor of said city, and attested by its city clerk, with the seal of said city attached, this fifteenth day of January, A. D. 1889.

——— ———,

Mayor of the City of Santa Cruz.

——— ———, *City Clerk.* [SEAL.]'

The coupons attached to said bonds shall be substantially in the following form:

'$25. *Municipal Improvement Fund No. 5.*

Coupon number —.

The City of Santa Cruz, by its city treasurer, will pay to the bearer hereof, at the office of said treasurer in said city on the tenth day of January in the year — twenty-five dollars gold coin for interest on bond No. —, issued January 15, 1889, under the provisions of the act of the legislature of the State of California, entitled "An act authorizing the incurring of indebtedness by cities, towns, or mu-

nicipal corporations incorporated under the laws of this State," approved March 15, 1887, and an election held therefor September 6, 1888.

——— ———,
Mayor of the City of Santa Cruz.

———— ————, *City Clerk.*'

SECTION 2. The city clerk is hereby authorized and required to cause to be prepared and printed, or lithographed upon linen parchment of the most suitable quality therefor, six hundred blank bonds with coupons attached of the form and denomination herein specified and provided for, sufficient in number, and have the
401 same ready for execution on behalf of this city on or before the fifteenth day of January, A. D. 1889.

SECTION 3. The city clerk is hereby directed to cause to be published in the Santa Cruz "Daily Surf" and the Santa Cruz "Daily Sentinel," newspapers published in the city of Santa Cruz, and also in the San Francisco "Daily Evening Bulletin," a newspaper published in the city and county of San Francisco, daily, for the period of twenty days prior and up to the first day of December, 1888, a notice of the intention of the mayor and common council of Santa Cruz to sell such number of the aforesaid bonds as they may deem necessary, and stating that sealed bids for the purchase of said bonds, or any number thereof, will be received by the city clerk on behalf of the mayor and common council at his office in said city, from the first publication of said notice up to the hour of 8 o'clock p. m. of the third day of December, 1888, and that thereafter the bonds will be sold by the mayor and common council to the highest and best bidder for cash, in United States gold coin, to be paid on delivery of said bonds at the city treasurer's office in said city of Santa Cruz. Said notice shall also state that the mayor and common counsel reserve the right to accept any portion of any bid and also to reject any and all bids, or any portion of any bids, and also that no bid will be considered that is for less than the face value of the bonds bid for. Said notice shall also state the number and denomination of said bonds, the number of series thereof, and the length of time that the several series have to run before becoming due, and
402 that not less than one bond of each series of the entire issue will be delivered in such aggregate amounts made up of an equal number of each series of the entire issue as the mayor and common council shall from time to time determine; that said delivery will be made with a rebate of any and all interest appearing to be due at the time of the delivery thereof; that the purchase price must be paid on the delivery of the bonds at the office of the city treasurer of said city; that the purchaser or purchasers of said bonds must give an undertaking with, at least, two sufficient sureties in the penal sum of ten per cent. of the purchase price payable to the city of Santa Cruz, and conditioned that the purchaser shall, within thirty days after receiving notice of readiness on the part of the mayor and common council to deliver up said bonds, take up and pay for the said bonds as delivered, according to the terms of the

notice given of the sale; and that a failure to take and pay therefor within the time named shall be a breach of the undertaking, and the sum mentioned in said undertaking shall be held and considered as liquidated damages; and that the said undertaking may be sued upon immediately in the name of the city of Santa Cruz, and the amount specified recovered in the name of the city of Santa Cruz, and the amount specified recovered as liquidated damages; that a deposit in the United States post-office at the city of Santa Cruz of the notice and readiness to deliver said bonds, signed by the city clerk, with the city's seal affixed, and addressed and directed to the purchaser of said bonds at his place of residence or business, as given in his bid, shall be deemed and taken as notice to the purchaser from the date of such deposit; and the purchaser's
403 assent to the form of notice herein provided for shall be embodied in said undertaking. The undertaking above referred to shall be filed with the city clerk, and retained in his custody as security against loss or damage to the city in case of failure to take or pay for said bonds by the purchaser.

SECTION 4. There shall be levied and collected annually for the term of twenty years by the proper authorities of the city of Santa Cruz at the time of the levy and collection of other city taxes, and, in addition to all other taxes levied for city purposes, a special tax sufficient to pay the annual interest as it falls due on said bonds that may be from year to year outstanding, and also sufficient to pay one twentieth part of the aggregate amount of said indebtedness so incurred. The moneys so collected shall constitute a sinking fund for the payment of the principal amount of which said indebtedness within twenty years from the time of contracting the same, and so that the indebtedness may be wholly paid by the tenth day of January, 1909, unless the said bonds shall have been previously redeemed.

SECTION 5. The taxes levied and collected as aforesaid shall be deposited in the treasury of the city of Santa Cruz to the credit of the municipal fund No. 5, authorized herein, and the amount of said tax so to be levied and collected as aforesaid shall be appropriate to the payment of the interest coupons of said bonds, and to the several principal sums thereof as they shall fall due, and payment thereof be demanded or required by the holder or holders thereof. All moneys deposited in the said fund shall be and
404 remain therein applicable only to the purpose herein provided for, and shall not be transferred to or borrowed by any other fund, temporarily or otherwise, or be used by the city authorities for any other purpose.

SECTION 6. This ordinance shall be in force from and after its passage and approval.

Passed this eighth day of October, A. D. 1888, by the following vote: Ayes, Councilmen W. Finkeldey, H. Willey, and E. H. Garrett.

Approved this eighth day of October, A. D. 1888.

G. BOWMAN,

Mayor of the City of Santa Cruz.

Attest: W. H. BIAS, *City Clerk.*"

The defendant then offered and read in evidence ordinance No. 170 of the city of Santa Cruz, directing the clerk to give notice inviting proposals for the sale of city bonds; which said ordinance reads as follows:

Ordinance No. 170.

"Ordinance No. 170.—Directing the clerk to give notice inviting proposals for the sale of city bonds.

SECTION 1. The city clerk is hereby directed to cause to be published in the Santa Cruz 'Daily Surf' and the Santa Cruz 'Daily Sentinel,' newspapers published in the city of Santa Cruz, and also in the daily 'Evening Bulletin,' a newspaper published in the city and county of San Francisco, daily for the period of two weeks prior to the tenth day of December, A. D. 1888, a notice of the intention of the mayor and common council of the city of Santa
405 Cruz to sell such number of the bonds ordered to be issued by the city of Santa Cruz by ordinance No. 168, that they may deem necessary, and stating that sealed bids for the purchase of said bonds, or any number thereof, will be received by the city clerk on behalf of the mayor and common council, at his office in said city, from the first publication of said notice up to the hour of 8 o'clock p. m. of the tenth day of December, 1888, and that at that hour, or thereafter, the bonds will be sold by the mayor and the common council to the highest and best bidder for cash, in United States gold coin, to be paid on delivery of said bonds at the city treasurer's office in the said city of Santa Cruz. Said notice shall also state that the mayor and common council reserve the right to accept any portion of any bid, and also to reject any and all bids, or any portion of any bid, and also that no bid will be considered that is for less than the face value of the bonds bid for. Said notice shall also state the number and denomination of said bonds, the number of series thereof, and the length of time that the several series have to run before becoming due, and that not less than one bond of each series of the entire issue will be delivered to any purchaser whose bid shall be accepted; said delivery to be in such aggregate amounts, made up of an equal number of bonds of each series of the entire issue as the mayor and common council shall from time to time determine; that said delivery will be made with a rebate of any and all interest appearing to be due at the time of the delivery thereof; that the purchase price must be paid on the delivery of the bonds at the office of the city treasurer of said
406 city; that the purchaser or purchasers of said bonds must give an undertaking with at least two sufficient sureties in the penal sum of ten per cent. of the purchase price, payable to the city of Santa Cruz, and conditioned that the purchaser shall, within thirty days after receiving notices of readiness on the part of the mayor and common council to deliver said bonds, take up and pay for said bonds as delivered, according to the terms of the notice given of the sale, and that a failure to take and pay therefor within the time named shall be a breach of the undertaking, and that the

sum mentioned in said undertaking shall be held and considered as liquidated damages, and that the said undertaking may be sued upon immediately in the name of the city of Santa Cruz, and the amount specified recovered as liquidated damages; that a deposit in the United States post-office at the city of Santa Cruz of a notice of readiness to deliver said bonds, signed by the city clerk, with the city's seal affixed, and addressed and directed to the purchaser of said bonds at his place of residence or business as given in his bid, shall be deemed and taken as notice to the purchaser from the date of such deposit; and the purchaser's assent to the form of notice herein provided for shall be embodied in said undertaking. The undertaking above referred to shall be filed with the clerk and retained in his custody as security against loss or damage to the city in case of failure to take or pay for said bonds by the purchaser.

SECTION 2. Section 3 of ordinance No. 168, entitled, 'An ordinance to provide for the issuance and sale of bonds of the city of Santa Cruz,' passed and approved October 8, A. D. 1888, is hereby repealed.

407 SECTION 3. This ordinance shall be in force from and after its passage and approval.

Passed this nineteenth day of November, A. D. 1888, by the following votes: Ayes, Councilmen W. Finkeldey, H. Willey, E. H. Garrett, and C. W. Piatt.

Approved this nineteenth day of November A. D. 1888.

GUSTAVUS BOWMAN,
Mayor of the City of Santa Cruz.

Attest: W. H. BIAS, *City Clerk.*"

The defendant then offered and read in evidence a resolution of the common council of the city of Santa Cruz, adopted at a meeting held on January 14, 1889; which said resolution appears on page 457 of Minute Book No. 2 of the common council of the city of Santa Cruz, and reads as follows:

Resolution.

By common council of the city of Santa Cruz, Jan. 14, 1889.

"It was moved by Councilman Willey, seconded by Councilman Finkeldey, that the following resolution be passed:

"'Whereas, the bonds authorized at an election held in the city of Santa Cruz on the sixth day of September, and amounting to three hundred thousand dollars, are now ready for signature and issuance to purchasers:

"'It is hereby resolved, by the mayor and common council of said city, that the mayor of said city be, and he is hereby
408 authorized and directed to negotiate and deliver any of said bonds to a purchaser or purchasers thereof at not less than their par value, but such delivery is not to be made unless such purchaser or purchasers, or their agents, exhibit and present to said mayor a receipt from the treasurer and collector, showing that the purchase price of the bond or bonds so negotiated has been paid

into the city treasury and received by said treasurer and collector in his official capacity, and at each regular meeting of the council, and oftener if required by the council, the mayor shall report in writing the amount of bonds so negotiated and delivered with the number of each bond, the payee thereof, and the date when — the person to whom delivered, and shall file with said report said receipts of the treasurer and collector, an abstract of which report shall be recorded with the clerk in a suitable book, and shall be spread upon the minutes of the council, which motion was put to a vote by his honor; Councilmen Finkeldey, Willey, Garrett, and Piatt voted in favor of said motion; whereupon the mayor declared the motion carried.'"

Defendant then offered and read in evidence report of G. Bowman, mayor of the city of Santa Cruz, to the common council of the city of Santa Cruz; which said report was dated September 12, 1889, and showed that, of the $300,000 bond issue of January 15, 1889, thirty bonds were sold on the fifteenth of January, 1889, sixteen on the seventeenth of January, 1889, one on the fifteenth of January, 1889,; thirteen on the fifteenth of January, 1889, and the remainder of said bond issue to Coffin & Stanton on the twelfth of September, 1889.

The above offer was objected to by the plaintiff on the
409 ground that the evidence offered was incompetent to sustain the issue that these obligations were not obligations of the city, simply because they were sold at a date after the repeal of the act which authorized their execution, unless the defendant offered to go further and show that these bonds never had been in or passed through the hands of purchasers for value without notice.

Counsel for defendant stated that the bonds were sold on September 12, 1889, to Coffin & Stanton, were by them sold and transferred to other persons, whose knowledge of the date of the sale of the bonds by the city of Santa Cruz, counsel were not able to show. The plaintiff's objection was overruled, and plaintiff took an exception.

CHARLES E. WILLIAMS, a witness on behalf of the defendant, testified as follows:

That he was city treasurer and tax collector of the city of Santa Cruz, and had held that office since April, 1892, continuously; that the city of Santa Cruz had never received any payment for the refunding bonds, or any of the refunding bonds, purporting to have been executed and dated April 16, 1894, and that no money had ever at any time come into his possession as treasurer or otherwise in the payment of any of those bonds.

On cross-examination the witness testified: That since the issue of the refunding bonds, some of the original bonds of the city of Santa Cruz, described in the ordinance as the bonds for which the refunding bonds were to be issued, had come to him indirectly through the city clerk for cancellation, the city clerk referred to being Mr. O. J. Lincoln; that Mr. Lincoln came to the office
410 of witness and presented a package, but that witness did not do anything—he refused to do anything; and that Mr. Lin-

coln took the package away; that when Mr. Lincoln produced the bonds at the office of the witness, he said: "Here are some bonds which have been returned by Coffin & Stanton, which you are to enter in your books;" that witness refused to have anything to do with them whatever; that this may have been two or three months after Coffin & Stanton received the refunding bonds, probably July or August, and before Coffin & Stanton had failed; that witness had since seen some of those bonds, one or two of them, which had been removed from the package; that they were the mortgage bonds of the private water company known as the City Water Company of Santa Cruz; that he did not know what had become of such bonds.

On redirect examination the witness testified: That on the thirteenth of March, 1894, the bonded indebtedness of the city of Santa Cruz, evidenced by bonds and warrants of said city, as appeared on the books of the treasurer, amounted to about $40,000 on account of the bonds issued on improvement funds, Nos. 1, 2, 3, and 4, and $225,000 on account of the water bonds, dated January 15, 1889, all being municipal improvement bonds; that there was no record whatever of the eighty-nine so-called first-mortgage bonds of the corporation, the City Water Company of Santa Cruz, in his office as treasurer of the city, and that said mortgage bonds were not part of the bonded indebtedness of the city of Santa Cruz, so far as the treasurer's books show.

On recross-examination the witness testified: That his
411 books did contain entries with regard to the payment of interest on said first-mortgage bonds of the water company, but that his books contained no entries in regard to the bonds of said private corporation; that on one occasion in 1893, interest on said mortgage bonds was forwarded to the Holland Trust Company for payment, and an account of such disbursement appears in the books of his office; that there is no other entry of any such payment of interest; that the city council created what was called a mortgage bond fund in 1892 or 1893, and that certain receipts derived from the water works were carried to the credit of this fund, and that against this fund was charged the payment of the sum transmitted to the Holland Trust Company in 1893, in payment of interest on said mortgage bonds; that witness as treasurer is still crediting to said mortgage bond fund a certain proportion of the receipts from the water works.

Mr. Thomas then questioned the witness as follows:

Q. Have you got that account with you?
A. No, sir.
Q. But you have paid no interest on those bonds since the first?
A. No, sir.
Q. Do you know what there is standing to the credit of that fund today?

Mr. Maguire: I object to the question as immaterial and not cross-examination.

The COURT: I will overrule the objection.
Mr. MAGUIRE: We will take an exception.

412 The witness then answered that there was standing to the credit of said mortgage bond fund $14,100, and some odd dollars.

On further redirect examination the witness testified that he sent the Holland Trust Company in 1893 a draft, the amount of which he did not remember; that subsequently the city heard from said Holland Trust Company, and said trust company claimed that the amount was not sufficient to pay the interest on the bonds as they had the account made out; that this led to a great deal of correspondence between the witness and the Holland Trust Company; that the said trust company claimed there was $103,000 worth of those bonds outstanding or issued by them; that the city claimed there was only $89,000 that had been issued; that the amount sent the Holland Trust Company by witness in 1893 was sufficient to pay interest then due on $89,000 of said mortgage bonds; that no interest has ever been paid on any of the mortgage bonds other than the $89,000 worth, the interest on which was forwarded to the Holland Trust Company in 1893; that interest was paid in that year, 1893, on eighty-nine of the mortgage bonds, for the reason that the city authorities then claimed that no more should have been issued under the contract with Coffin & Stanton.

The defendant then offered and read in evidence an affidavit of the publication of a notice of sale of bonds in the San Francisco "Chronicle," which affidavit was marked Defendant's Exhibit "Q," and reads as follows:

DEFENDANT'S EXHIBIT "Q."

"*Notice of Sale of Bonds.*

413 "Notice is hereby given that it is the intention of the mayor and common council of the city of Santa Cruz, in the State of California, to sell three hundred and sixty (360) bonds of said city of Santa Cruz of the denomination of one thousand dollars ($1,000) each, and which said bonds and the coupons thereto attached shall be substantially in the following form, to wit:

"'UNITED STATES OF AMERICA, *State of California.*

"*Bond of the City of Santa Cruz.*

"'No. —. Series —. $1,000.

"'*Refunding Bond.*

"'The City of Santa Cruz, a municipal corporation in the county of Santa Cruz, State of California, is indebted to and promises to pay to the bearer, for value received, the sum of one thousand ($1,000) dollars, gold coin of the United States, on the fifteenth day of April, A. D. —, with interest thereon, in like gold coin, at the

rate of five (5) per cent. per annum, payable annually on the fifteenth day of April of each calendar year from the date hereof, at the office of the city treasurer of said city of Santa Cruz, on presentation and surrender of the proper interest-bearing coupon hereto attached.

"'And for the payment of the principal sum herein named, and the interest accruing thereon, the said City of Santa Cruz is held and firmly bound, and its faith and credit, and all the real and personal property of said city are hereby pledged for the prompt payment of this bond and interest at maturity.

"'This bond is one of a series of bonds of like date, tenor
414 and effect, issued by the said City of Santa Cruz for the purpose of refunding the bonded indebtedness of said city and issuing bonds therefor, and providing for the payment of the same, and in pursuance of and in conformity with the provisions of an act of the legislature of the State of California, entitled "An act to amend an act entitled 'An act to authorize the common council, board of trustees, or other governing body of any incorporated city or town, other than cities of the first class, to refund its indebtedness, issue bonds therefor, and provide for the payment of the same' (approved March 15, 1883)," approved March 1, 1893.'

"And in pursuance of and in conformity with the constitution of the State of California and the ordinance of the city of Santa Cruz, and in pursuance of and in conformity with a vote of more than two-thirds of all the qualified electors of said city of Santa Cruz, voting at a special election duly and legally called and held and conducted in said city, as provided under said act, on Tuesday, the thirteenth day of March, 1894, notice thereof having been duly and legally given and published in the manner as required by law, and after the result of said election had been duly canvassed, found and declared in the manner and as required by law.

"And it is hereby certified and declared that all acts, conditions and things required by law to be done precedent to and in the issue of said bonds, have been properly done, happened, and performed in legal and due form as required by law.

415 "This bond ceases to bear interest when due unless presented for payment.

"In testimony whereof, the said City of Santa Cruz, by its mayor and common council, has caused this bond to be signed by the mayor of said city of Santa Cruz, and attested by its said clerk, with the seal of said city attached, this sixteenth day of April, A. D. 1894.

"——— ———,

"*Mayor of the City of Santa Cruz.*

"Attest: ——— ———, *City Clerk.*

"The coupons attached to said bonds shall be substantially in the following form:

"'Refunding bond number —. Coupon number —.

"'The City of Santa Cruz will pay to the bearer hereof, on the fifteenth day of April, A. D. —, at the office of the city treasurer

of said city, fifty ($50) dollars, gold coin of the United States, for interest on bond number —, issued sixteenth day of April, A. D. 1894.

"'—— ——,

"'*Mayor of the City of Santa Cruz.*

"'—— ——, *City Clerk.*'

"That sealed bids for the purchase of said bonds, or any number thereof, will be received by the city clerk on behalf of the mayor and common council of said city, at the office of the city clerk, in said city of Santa Cruz, from the first publication of this
416 notice up to the hour of 2 o'clock p. m., on the sixteenth day of April, 1894, and thereafter said bonds will be sold by the mayor and common council to the highest bidder, for not less than their face value, in United States gold coin, to be paid on delivery of said bonds, at the city treasurer's office in said city of Santa Cruz.

"Said bonds shall be three hundred and sixty (360) in number, of the denomination of one thousand dollars ($1,000) each, and shall bear interest at the rate of five per cent. per annum, payable annually. They shall be of the character known as 'serials,' and shall be payable, principal and interest, in gold coin of the United States in the manner following:

"One-fortieth part of the principal of the indebtedness to be incurred in the issuing of said bonds shall be payable annually, to wit, the sum of nine thousand dollars (9,000), together with the annual interest on all sums of said indebtedness then unpaid.

"Said bonds shall be numbered consecutively from one to three hundred and sixty (360), both inclusive, and shall be divided into forty series, to be numbered consecutively from one (1) to forty (40), both inclusive, and consisting of nine (9) bonds each. The first series shall include those bonds which are numbered from one (1) to nine (9) inclusive, and each succeeding series shall include the nine (9) bonds which are numbered consecutively with those included in the next preceding series.

"The bonds included in the first of said series shall be made payable on the fifteenth day of April, A. D. 1895, and all of
417 the remaining series shall be made payable in consecutive order on the fifteenth day of April, in each succeeding calendar year thereafter until and including the year 1934.

"Each bid must be accompanied by a certified check on the Bank of Santa Cruz County, of the city of Santa Cruz, payable to the order — the mayor of the city of Santa Cruz, for five (5) per cent. of the amount bid by the bidder, as a guarantee on the part of the bidder that, in case his bid is accepted, he will, within twenty days after receiving notice of the readiness on the part of the mayor and common council to deliver said bonds, take and pay for the same as delivered, according to the terms of this notice of sale; and that, in case of the failure of any bidder whose bid shall be accepted for said bonds, or any part thereof, to take and pay for the bonds for which his bid may be accepted, within said time named, his check shall be

collected by said mayor, and the money collected thereon shall be paid to the city of Santa Cruz as liquidated damages accruing to said city of Santa Cruz against said defaulting bidder. All checks of bidders whose bids shall not be accepted will be returned to them; that the deposit in the United States post-office at the city of Santa Cruz of a notice of the readiness to deliver said bonds, signed by the city clerk, with the seal of the city affixed, and addressed and directed to the purchaser of said bonds, at his place of residence, as given in his bid, shall be deemed and taken as notice to the purchaser from the date of such deposit, and the purchaser's assent to the form of notice herein provided shall be embodied in his bid.

418 "The mayor and common council reserve the right to accept any portion of any bid, and also to reject any and all bids or any portion of any bid, and, also, that no bid will be considered that is for less than the face value of the bonds bid for.

"By order of the mayor and common council of the city of Santa Cruz, State of California.

"O. J. LINCOLN,
"*City Clerk of said City of Santa Cruz.*

"Dated March 28, 1894."

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

C. E. Ray, of the said city and county, being duly sworn, affirms and says: That he is a white male citizen of the United States; that he is over twenty-one years of age, and is competent to be a witness on the hearing of the matters mentioned in the annexed printed notice; that he has no interest whatsoever in the same; that he is principal clerk of M. H. de Young, printer and publisher of the San Francisco Chronicle, a newspaper which is printed and published daily and weekly in the city and county of San Francisco, and has charge of all the legal advertisements in said newspaper; and that the notice of sale of bonds of which the annexed is a printed copy, has been published in said newspaper at least nineteen times consecutively, commencing on the twenty-ninth day of March, A. D. 1894, and ending on the sixteenth day of April, A. D. 1894, both days inclusive. And further sayeth not.

C. E. RAY.

419 Subscribed and sworn to before me this ninth day of November, 1897.

JOHN J. DEANE,
Notary Public in and for the City and County of
[SEAL.] *San Francisco.*

The defendant then offered and read in evidence an affidavit of publication of the same notice of sale of bonds in the "Santa Cruz Sentinel," which affidavit was marked "Defendant's Exhibit R," and reads as follows:

DEFENDANT'S EXHIBIT "R."

Affidavit of Publication.

In the City of Santa Cruz, County of Santa Cruz, State of California.

In the Matter of Sale of Municipal Bonds of THE CITY OF SANTA CRUZ.

Affidavit of publication of notice of sale of bonds.

STATE OF CALIFORNIA, } ss:
County of Santa Cruz, }

Duncan McPherson, being duly sworn according to law, says: That he is now, and — all the dates hereinafter mentioned was, a citizen of the United States, over twenty-one years of age, and a resident of the city of Santa Cruz, county of Santa Cruz, State of California; that he has no interest whatsoever in the matter of said notice of sale of bonds, and is competent to be a witness at the hearing of any proceedings in said matter; that the "Santa Cruz Daily Sentinel" is now and at all the dates herein mentioned was, a newspaper printed and published daily (Mondays and days following legal holidays excepted) at the said city of Santa Cruz, in said county and State; that the said affiant is now and was at all of the dates herein mentioned, one of the printers of said newspaper and the principal clerk in the office thereof, and as such printer and clerk has, and at all of said dates had, charge of all the advertisements in said newspaper; that an advertisement, to wit: a notice of sale of bonds, of which the annexed is a true and correct printed copy, has been published in said newspaper at least fifteen days, and as often during the period of said fifteen days as said newspaper was regularly issued, to wit: on each of the following dates: March 29, 30, and 31, 1894, April 1, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, and 15, 1894.

420

DUNCAN McPHERSON.

Subscribed and sworn to before me this nineteenth day of April, 1894.

Z. N. GOLDSBY,
Notary Public.

The defendant then offered and read in evidence an affidavit of publication of the same notice of sale of bonds in the Santa Cruz "Surf," which affidavit was marked "Defendant's Exhibit S," and reads as follows:

DEFENDANT'S EXHIBIT "S."

Affidavit of Publication.

In the Superior Court of the County of Santa Cruz, State of California.

Affidavit of publication of notice of sale of bonds.

421 STATE OF CALIFORNIA, } ss:
County of Santa Cruz, }

Ernest Otto, being duly sworn according to law, says: That he is now and at all the dates hereinafter mentioned was, a citizen of the United States, over twenty-one years of age, and a resident of the city of Santa Cruz, county of Santa Cruz, State of California; that he has no interest whatsoever in the matter, and is competent to be a witness at the hearing of any proceedings thereof; that the "Santa Cruz Surf" is now, and at all the dates herein mentioned was, a newspaper printed and published daily (Sundays and legal holidays excepted) at the said city of Santa Cruz, in said county and State; that the said affiant is now, and was at all of the said dates herein mentioned, the principal clerk in the office of said newspaper, and as such clerk has, and at all of said dates had charge of all the advertisements in said newspaper; that the advertisement, to wit: notice of sale of bonds, in the matter of which the annexed is a true and printed copy, has been published in said newspaper at least —, and as often during the period of said — as said newspaper was regularly issued, to wit: on each of the following dates: March 29, 30, and 31, April 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 16, 1894.

ERNEST OTTO.

Subscribed and sworn to before me this seventeenth day of April, 1894.

O. J. LINCOLN, *City Clerk.*

[Seal of the City of Santa Cruz, Cal.]

422 The defendant then offered and read in evidence resolution No. 14 of the mayor and common council of the city of Santa Cruz; which said resolution was marked "Defendant's Exhibit T," and reads as follows:

DEFENDANT'S EXHIBIT "T."

Resolution No. 14.

"Resolution No. 14.—Resolved, That the mayor and common council do hereby authorize the City Water Company of Santa Cruz to issue to Messrs. Coffin & Stanton bonds of said company to a total par value of twenty-two thousand dollars.

"Adopted this twenty-fourth day of November, A. D. 1890, by

the following vote: Ayes, Councilmen Finkeldey, Young and Drullard; noes, none; absent, Councilman Weeks.

"(Signed) O. J. LINCOLN, *City Clerk.*

"Approved this twenty-fourth day of November, A. D. 1890.

"G. BOWMAN,

"*Mayor City of Santa Cruz.*

"Attest: O. J. LINCOLN, *City Clerk.*"

O. J. LINCOLN, a witness on behalf of defendant, was then recalled, and testified as follows:

That he was present in court when the contract of Coffin & Stanton and the order of the city council of Santa Cruz, accepting
423 the offer of Coffin & Stanton, was put in evidence, and also the resolution offered in evidence, and also said resolution No. 14, just offered and read in evidence, authorizing the transfer by the City Water Company of twenty-two bonds to Coffin & Stanton; that the said contract and order of the common council provided for delivering fifty of those bonds to Coffin & Stanton; that there was no other authorization to deliver bonds of the City Water Company to Coffin & Stanton; that by order of the said common council, Coffin & Stanton were to receive in all $72,000 of said mortgage bonds.

The said witness, O. J. LINCOLN, was then, by permission of the court, examined in chief on behalf of the plaintiff, and testified as follows:

(By Mr. THOMAS:)

Q. Mr. Lincoln, will you kindly examine the minutes of the proceedings of the common council under dates of April 24, April 25, April 30, May 3, May 5, and the first of the two meetings of May 7, 1894, in which you have stated that on roll-call all were present. Can you now state from your memory, and refreshing the same from those entries, whether William T. Jeter, the mayor of the municipality, was present at those meetings?

Mr. MAGUIRE: I object to the question as immaterial, irrelevant and incompetent.

The COURT: I overrule the objection.

Mr. MAGUIRE: I will take an exception. I assume that this evidence is intended to show that Mr. Jeter was a *de facto* officer for the purpose of participating in the authorization of the delivery and sale of the bonds. Our objection, in addition to the objection
424 we have made, goes to the point that this would not at all tend to show that he was a *de facto* officer on the afternoon of the sixteenth day of April, 1894.

The COURT: I overrule the objection.

Mr. MAGUIRE: I take an exception.

The witness then answered that William T. Jeter was present at such meetings.

The witness then testified that after the delivery of the refunding bonds to Coffin & Stanton, the witness had received fifteen $1,000 mortgage bonds of the City Water Company of Santa Cruz, and three $500 bonds, known as the five per cent. water bonds of the city of Santa Cruz; that said bonds came to him by registered mail, addressed to him, but that he couldn't state whether the title city clerk was added to the address or not; that he ascertained from the enclosure that the bonds were sent to him by Coffin & Stanton; that after opening the package and finding what they contained, he took them to the city treasurer, who declined to receive them, and that, at the end of witness's term of office as city clerk, he turned over said bonds to his successor.

On cross-examination the witness testified that at the time he received such bonds he did not know, and had no means of knowing, how many of the mortgage bonds of the City Water Company of Santa Cruz had been issued by the Holland Trust Company to Coffin & Stanton, and that at that time he did not know of his own knowledge whether there were more than eighty-nine of those bonds issued to Coffin & Stanton.

425 It is admitted by plaintiff that from the thirtieth of June, 1888, to the first of July, 1895, the assessed valuation of all taxable real and personal property in the city of Santa Cruz did not exceed $3,907,404.00 at any time.

The plaintiff then offered in evidence ordinance No. 329 of the city of Santa Cruz, passed and approved on the twenty-fourth day of September, 1894; to which defendant objected on the ground that the same was immaterial, irrelevant, and incompetent. The objection was by the court overruled; to which ruling of the court the defendant duly excepted. The ordinance was then read in evidence as follows:

(Here insert ordinance No. 329, page 305, and down to the words "Mr. Maguire," on page 306, vol. IV of said transcript.)

It was admitted by the plaintiff that nothing has ever been paid by the city of Santa Cruz on account of principal or interest of any of the refunding bonds alleged to have been issued by said city of Santa Cruz, and bearing date the sixteenth day of April, 1894.

Mr. Maguire here stated that since the signing of the stipulation as to certain facts heretofore offered and read upon the trial, he had ascertained that, in addition to the publication of the ordinance calling a special election upon the question of acquiring and constructing water works, a notice of such election, printed on cardboard, was posted at the polling places, and offered to amend the stipulation by incorporating that admission in place of the admission that a copy of the ordinance simply had been posted at such polling places.

Plaintiff's attorney here inquired if defendant's attorney
426 would admit that the notice was posted at all of the polling places for the time and in the manner described by the ordinance.

Mr. MAGUIRE: Mr. Lindsay's recollection on that subject is not

sufficient to enable me to say that. I will agree to all that is true concerning the matter, as soon as we ascertain what the fact is.

The COURT: It can be modified.

Mr. MAGUIRE: We will correct the stipulation in accordance with the facts in that behalf.

Counsel for defendant thereupon offered to read in evidence the deposition of Walter Stanton, taken on behalf of defendant.

Mr. THOMAS: I make a formal objection here, that counsel for defendant are required to introduce their evidence in the same order in which it was taken. The evidence of Stanton, as your honor will see, contradicts, to a considerable extent, or at least we so maintain, the testimony of one of the witnesses taken on behalf of the defendant, namely, F. H. Prince. A good many of the questions and answers asked of Mr. Stanton are, we think, subject to an objection that they contradict the testimony of a witness whose testimony was taken previous to that of Stanton's, and without laying the proper foundation for contradicting the witness. Unless this case can proceed upon the same theory upon which the depositions were taken, it will be impossible for us to make objections until after the close of both depositions, when we must make a motion to strike out. It seems to me proper in this case for counsel for plaintiff to insist that the order of trial, and the order of production of the depositions, shall be the same order in which they
427 were taken chronologically, in order that we may raise the objections that I have just suggested. For example, with the witness F. H. Prince, who we maintain will testify to a certain fact. The testimony of Stanton, we shall maintain, is, that on some other occasons, Mr. Prince stated otherwise than he testified. Our principal objection to that testimony on the part of Mr. Stanton is, that the proper foundation was not laid for it. On the examination of Mr. Prince, he was not asked if he did not, on a certain occasion, and to a certain person, make a statement different to the one he testified to. If counsel are at liberty to introduce their depositions in the order they see fit, that objection cannot be made, because your honor has not before you the depositions of the witnesses previously taken. We, therefore, make a motion that counsel be required to introduce their depositions in the order in which they were chronologically taken.

The COURT: If the purpose of the testimony is to impeach the testimony of your witness—your witness, I understand.

Mr. THOMAS: No, sir, a witness called by the defendant.

The COURT: Then I shall deny your motion, and let counsel proceed in their own way.

Mr. THOMAS: We will take an exception.

Mr. MAGUIRE: I will explain to your honor the position. The question Mr. Thomas raises may arise upon an objection to some of these questions. The fact is, that Mr. Wallace, a witness, a
428 witness on behalf of the plaintiff, gave testimony which we think shows that F. H. Prince & Co. were acting as the agents of E. G. & E. Wallace in the purchase of 150 Santa Cruz bonds, involving $150,000 and interest, in a matter that will be

largely determined by the result of this action. F. H. Prince, when examined as a witness on behalf of the defendant, gave testimony which was contrary to what we believe to be the fact, and what we expect to prove by him. We attempted to prove by Mr. Walter Stanton the facts that we have expected to prove by Mr. Prince, and that we think are shown by the testimony of Mr. Wallace. We prefer to offer at this time the testimony of Mr. Stanton, and let the objections urged by Mr. Thomas be made to the questions that may seem to involve impeachment, if they do. We are not at liberty to impeach our own witness, but we may contradict him. We have called for testimony that does contradict Mr. F. H. Prince, from Mr. Stanton. We do not feel that we are in any way bound by the testimony of Mr. Price, except so far as it would bear against us if he were a witness for the other side. Probably we may not impeach him in the sense in which that term is accepted.

Mr. THOMAS: Your honor denies my motion?

The COURT: Yes.

Mr. THOMAS: We will take an exception.

Mr. Lindsay (one of the attorneys for defendant), then proceeded to read the deposition of Walter Stanton, which is in substance as follows:

WALTER STANTON, having been duly sworn, testified as follows:

429 I reside at Hillsdale, New Jersey; was formerly of the firm of Coffin & Stanton. That firm was composed of William Edward Coffin and Walter Stanton.

Q. Will you please look at paper marked for identification "Defendant's Exhibit 1," of August 4, 1897, "H. S. V. D., notary public," and state whether the signature "Coffin & Stanton" was signed by you?

A. That is my signature.

Mr. THOMAS: I move to strike out the answer as indefinite, as there is no notification by the commissioner which signature he pointed to when he identified it as his.

Mr. LINDSAY: It already appears there was but one signature; that he signed but one contract.

Mr. THOMAS: He does not say which that was. He says, "That is my signature," without specifying which.

Mr. MAGUIRE: That is the last page of what we know as the forged contract.

The COURT: Agreement No. 1 was the document which had his signature to it?

Mr. MAGUIRE: Yes. That, we say, was the forged instrument.

The COURT: It had his signature?

Mr. MAGUIRE: Yes.

The COURT: The other purports to be a certified copy?

Mr. MAGUIRE: That is a certified copy of what now purports to be the contract on file. The other one which he refers to, "Exhibit 2" for identification, was a certified copy of the contract as recorded in the minutes.

Mr. THOMAS: I withdraw the objection. I did not understand it.

(Mr. Lindsay proceeded with the reading of the deposition of Walter Stanton, as follows:)

430 I signed "Coffin & Stanton" to that paper. I personally negotiated the contract with the city of Santa Cruz. I cannot tell whether the paper is now in precisely the form in which it was when it was signed. All that I can tell is, that it is my signature. I cannot tell as to the phraseology of the contract. I remember that I did sign a contract relating to the refunding bonds, but whether "Exhibit 1" for identification is in the precise form in which I signed it, I cannot tell. I did not sign more than one contract in regard to those bonds.

Comparing the instruments, "Defendant's Exhibit 1" and "Defendant's Exhibit 2," I notice the following differences: In "Exhibit 1" the word "Walter," the first word of the second line, does not appear in "Exhibit 2." In "Exhibit 1," on the ninth line, the word is "contract"; in "Exhibit 2" the word in place thereof is "contracting." In "Defendant's Exhibit 1," on the fourteenth line, the words read "credit of the city of Santa Cruz funding," in "Exhibit 2" the words are "credit of the funding." In "Defendant's Exhibit 1" the fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, and twenty-first lines read as follows: "Against which shall be charged all outstanding bonds as above mentioned, taken up and refunded by said Coffin & Stanton, and when so taken up and refunded, they may be canceled by them and forwarded by express to the treasurer of the city of Santa Cruz for further cancellation. Such canceled bonds shall be charged against said fund at par (100), with interest to April 16th only." "Defendant's Exhibit 2" reads as follows, "And to be used to take up and refund the out-

431 standing bonds as above mentioned, Coffin & Stanton forwarding same from time to time to the city for cancellation, charging such bonds to the funding fund at par (100), with interest to April 16 only."

In "Defendant's Exhibit 1," the twenty-first line reads, "bonds of the City Water Company outstanding." In "Exhibit 2" in the place thereof, are the words, "all bonds of the City Water Company outstanding." In "Defendant's Exhibit 1," on the twenty-first and twenty-second lines, are the words, "over and above the $89,000." In "Exhibit 2," the words are, "over and *the* above $89,000." In "Defendant's Exhibit 1," in the twenty-fourth line, the words are "contract with the said city." In "Exhibit 2," the words are, "contract with said city." In "Defendant's Exhibit 1," the date reads, "dated at Santa Cruz." In "Exhibit 2," the words are, "dated at Santa."

(The witness, continuing:) I remember J. N. Goldsby, who signed his name as a witness to the contract, "Defendant's Exhibit 1." I have no recollection as to which of these exhibits is the contract signed by me. I cannot remember the phraseology. The exhibits relate to the same matter, except as to those differences in phrase-

ology. I have no recollection whether the contract signed by me had two or three sheets. It had more than one. I do not see that the variations in the exhibits make any difference, one way or the other. The prices are the same.

Q. In "Defendant's Exhibit 2," it is provided as follows: "The funds derived from the purchase of the $360,000 in said bonds, to be deposited with Coffin & Stanton, to the credit of the funding fund and to be used to take up and refund the outstanding bonds as above mentioned, Coffin & Stanton forwarding same from time to
432 time, to the city, for cancellation;" in "Defendant's Exhibit 1 for identification," the provision is: "The funds derived from the purchase of $360,000 in said bonds, to be deposited with Coffin & Stanton, to the credit of the city of Santa Cruz funding fund, against which shall be charged all outstanding bonds as above mentioned, taken up and refunded by said Coffin & Stanton." Is not the last-mentioned provision more favorable to Coffin & Stanton?

A. I do not think so.

Q. In "Defendant's Exhibit 2," you bound yourselves to use the money derived from the purchase of the $360,000 in bonds to take up and refund the outstanding bonds mentioned in the contract. Is there any such obligation in "Exhibit 1"?

A. I do not consider that we did so bind ourselves.

(The witness continuing:) I know F. H. Prince & Company, of Boston. I have had dealings with Mr. Prince, of that firm, in reference to these refunding bonds. We sold him a certain amount of the refunding bonds. I have not a distinct recollection of the transaction, and cannot state how many. I do not know when that was. It was in 1894, three or four months after the making of the contract with the city of Santa Cruz. It was a considerable amount. I am sure it was over $50,000.

My recollection is that at the time of the transaction, we transferred to the firm of F. H. Prince & Company the papers relating to the issue of the refunding bonds. My best recollection is that we sent all the papers relating to the bonds. It must have included
433 the contract. I have no recollection as to sending the contract, but I do remember that all the papers were sent to Boston. I gave my office orders to do so. I did not carry out the details. I think it was done in the natural course of business. It is the usual thing to do.

It is my recollection that Mr. Prince asked me for additional papers, subsequent to the sending of the first papers to Boston—some papers that had been left out; and Mr. Prince, or his office, asked me for additional papers. I gave orders that they were to be sent, but I cannot swear that they were sent. I do not recollect if anything was said in any of the communications to me by Mr. Prince, or Prince & Co., that they wanted the papers for their attorneys, nor why they wanted the additional papers. I think the negotiations on this transaction lasted about five or six weeks from the beginning until its consummation. It was not consummated until after the papers had been in their possession for some time.

The bonds were delivered to F. H. Prince & Co., or their agents, a considerable time after the papers had been in th-ir possession.

(On cross examination, the witness testified :) I did not personally send any papers to Prince & Co., nor see any sent by mail, clerk, or otherwise. My means of knowing that the papers were sent is, that they asked for additional papers verbally, but I do not know what additional papers were sent; and I do not know, at the time the p-pers were sent, what papers I had in my possession relating to this matter.

(On redirect examination, the witness testified :) My recollection is that I instructed the office, some clerk there, to send the
434 papers regarding the Santa Cruz bonds to F. H. Prince & Co. The request for additional papers was made to me personally.

DEFENDANT'S EXHIBIT No. 1.

Contract.

" Defendant's Exhibit 1, August 4, 1897."

"The city of Santa Cruz, deciding to refund $225,000 in 5 per cent. water bonds, $89,000 in 6 per cent. mortgage bonds, $39,000 municipal improvement bonds, with accrued interest thereon, total, $360,000, into $360,000 in 5 per cent. refunding bonds, of the denomination of $1,000 each, legally issued, under the act of the legislature of the State of California, approved March 1, 1893, advertising the sale of same, and in the event of the city not receiving satisfactory bids for such bonds at said sale, Coffin & Stanton agree to purchase said bonds at par and accrued interest, contract with the city to assume all obligations of interest and principal on the bonds to be refunded, making the refunding an assured fact from the date of the sale, and delivery of the bonds to them. The funds derived from the purchase of $360,000 in said bonds to be deposited with Coffin & Stanton to the credit of the city of Santa Cruz funding fund, against which shall be charged all outstanding bonds as above mentioned, taken up and refunded by said Coffin & Stanton, and when so taken up and refunded, they may be canceled by them and forwarded by express to the treasurer of the city of Santa Cruz for further cancellation. Such canceled bonds shall be charged against said fund at par (100), with interest to April 16, only.
435 Coffin & Stanton also agree to surrender and deliver to the city all bonds of the City Water Company outstanding, over and above the $89,000 above mentioned, and to surrender and assign to and release said city from all claims and demands against said city of Santa Cruz under their contract with the said city for construction of water works.

In consideration of the above agreement, the city on its part agrees to pay Coffin & Stanton 3 per cent. on the par value of the refunding bonds in the event of the city availing itself of its terms on or before April 16, 1894.

Coffin & Stanton further agree to prepare and furnish said city

with the blank bonds and coupons thereto at their own cost and expense.

Dated at Santa Cruz, February 27, 1894.

COFFIN & STANTON.

Witness to signature:
Z. N. GOLDSBY.

I, J. L. Wright, city clerk of the city of Santa Cruz, do hereby certify that the foregoing is a true and correct copy of a contract filed in the office of the city clerk of the city of Santa Cruz, on the sixteenth day of April, A. D. 1894.

J. L. WRIGHT,

[SEAL.] *City Clerk of the City of Santa Cruz.*"

DEFENDANT'S EXHIBIT No. 2.

Contract.

"Defendant's Exhibit 2, August 4, 1897."

Upon motion, it was ordered that the contract of Coffin &
436 Stanton, to refund the city indebtedness, dated February 27, 1894, and accepted by the council April 16, 1894, be entered upon the minutes of the board, viz:

The City of Santa Cruz deciding to refund $225,000 in 5 per cent. bonds, $89,000 in 6 per cent. mortgage bonds, $39,000 municipal improvement bonds, with accrued interest thereon, total $360,000, into $360,000 in 5 per cent. refunding bonds of the denomination of $1,000 each, legally issued under the act of the legislature of the State of California, approved March 1, 1893, advertising the sale of same and in the event of the city not receiving satisfactory bids for such bonds at said sale, Coffin & Stanton agree to purchase said bonds, at par, and accrued interest, contracting with the city to assume all obligations of interest and principal on the bonds to be refunded, making the refunding an assured fact, from the date of the sale and delivery of the bonds to them. The funds derived from the purchase of the $360,000 in said bonds to be deposited with Coffin & Stanton to the credit of the funding fund, and to be used to take up and refund the outstanding bonds as above mentioned, Coffin & Stanton forwarding the same from time to time to the city for cancellation, charging such bonds to the funding fund at par (100), with interest to April 16 only.

Coffin & Stanton also agree to surrender and deliver to the city all bonds of the city, all bonds of the City Water Company outstanding over the above $89,000 above mentioned, and to surrender and assign to and release said city from all claims and demands against said city of Santa Cruz under their contract with said city for construction of water works.

In consideration of the above agreement, the city on its
437 part agrees to pay Coffin & Stanton 3 per cent. of the par value of the refunding bonds, in the event of the city availing itself of its terms on or before April 16, 1894.

Coffin & Stanton further agree to prepare and furnish said city with the blank bonds and coupons thereto, at their own cost and expense.

Dated at Santa —, February 27, 1894.

(Signed) COFFIN & STANTON.

Witness to said signature:
Z. N. GOLDSBY.

I, J. L. Wright, city clerk of the city of Santa Cruz, do hereby certify that the foregoing is a true and correct copy of the above and foregoing contract as spread upon the minutes of the common council of the city of Santa Cruz, as contained on pages 226 and 227 of volume 3 of "Minutes of Common Council;" said minutes being the minutes of said common council at a meeting held on the twenty-third day of April, 1894, which said minutes were approved by the mayor of said city and attested by the clerk of said city, on May 5, 1894.

J. L. WRIGHT,
[SEAL.] *City Clerk of the City of Santa Cruz.*

H. S. V. D.,
Notary Public.

Mr. Lindsay, one of the defendant's attorneys, then read in evidence the deposition of Jacob L. Wright, as follows:

JACOB L. WRIGHT, a witness called for the defendant, and duly sworn, testified as follows:

"I live in the city of Santa Cruz, California. I am city
438 clerk and city assessor of the city of Santa Cruz. I have occupied the official position of city clerk since the first of May, 1896. As such city clerk I have the custody of papers and contracts belonging to the city; and as such clerk I am also clerk of the common council of the city, and keep the records of that council.

I have in my possession what purports to be a contract between Coffin & Stanton and the city of Santa Cruz. This is the paper (producing it). I found it in a file box in the vault in the city clerk's office in the city hall at Santa Cruz, among the papers marked on the outside of the box 'Coffin & Stanton, refunding bonds.' It is now in the condition in which it was when I found it. I cannot leave the contract here to be annexed to my deposition, because the laws of the State of California require me to keep all public records and documents in my possession and under my control at all times during my term of office. I am personally liable on my official bond for neglect of duty, if I allow it to go out of my possession.

This document, marked 'Defendant's Exhibit 1,' of August 4, 1897, each page being initialed 'H. S. V. D., notary public,' is a true copy of the original contract which I have produced.

(It is stipulated that the said copy of 'Defendant's Exhibit 1' be annexed to the deposition in lieu of the original contract.)

This instrument, 'Defendant's Exhibit 2,' of August 4, 1897, each

page being initialed 'H. S. V. D., notary public,' is a correct copy of a contract as I find it recorded in the minute book. This transaction had been completed at the time that I became city clerk, in May, 1896. Personally I have no knowledge of these matters.
439 The record is in Mr. O. J. Lincoln's handwriting. He was city clerk at that time, and still lives in Santa Cruz. I have no knowledge from what document he made that record."

CLARENCE D. TURNEY, a witness called for defendant, being duly sworn, testified as follows:

I live at New Brighton, Staten island; I am thirty-five years of age; I was employed by Coffin & Stanton from April, 1881, to October 4, 1894. During the years 1893 and 1894, I was general office manager for the firm. I remember a transaction with Messrs. Prince & Company, of Boston, relating to the funding bonds of the city of Santa Cruz, California, while I was acting as such general office manager. Part of the transaction was in my charge.

In order to save constant objection and interruption, counsel for plaintiff was granted leave to enter a general objection to any question relative to what F. H. Prince may have said to any witness outside of the hearing of any member of the firm of E. G. & E. Wallace, on the ground that such questions were incompetent in this: First, that the fact of agency cannot be proven by the declaration of the agent, and second, that such question tended to contradict F. H. Prince, called as a witness by the defendant, without laying the foundation for impeaching him, by calling his attention on cross-examination to the time, place, and persons present, etc. It was understood that such objection was to be deemed as overruled, and an exception by the plaintiff noted.

(The witness, continuing, testified:) I was present at some
440 of the conversations between members of the firm of Prince & Co. and members of the firm of Coffin & Stanton. The parties engaged in the negotiation or transaction while I was present were Mr. F. H. Prince, of Prince & Co., and Mr. Walter Stanton, of Coffin & Stanton. In these conversations, Prince said that he represented a client whose name he did not disclose. The negotiations resulted in the forwarding of refunding bonds of the city of Santa Cruz to Messrs. Prince & Co., with a draft attached. The transaction which was concluded was that a certain amount of Santa Cruz refunding bonds were sold to F. H. Prince & Co., at a price I do not now recollect, for which we were to take part in cash, and part payment was to be made in the stock of the Page Belting Co. I do not remember the price at which that stock was to be taken by Coffin & Stanton. The transaction culminated in the sale to Prince & Co. of a certain quantity of these Santa Cruz refunding bonds, in payment of which Prince was to give a certain amount cash, and the balance of these Page Belting stock.

Q. As-between Coffin & Stanton and Prince & Co., what was the relation of Prince & Co.?

This question was objected to by the plaintiff as incompetent, as calling for the legal conclusion of the witness.

The objection was overruled, and an exception taken.

A. Principal in the transaction. The only party whom we knew in the transaction was F. H. Prince & Co. Mr. Prince, so far as I ever knew, did not disclose who he was acting for. It is not customary for a broker to disclose his confidential relations with clients any more than a lawyer. I was not informed for whom he was acting. In the course of the negotiations, and before the
441 transaction was completed, papers and documents were delivered to Prince & Co. They were selected by Mr. Stanton and myself, and either forwarded by me, or under my supervision, to F. H. Prince & Co. I am very positive about that. I recognize the papers contained in the package marked "Santa Cruz refunding bonds. Full transcript of proceedings *in re* issue." I am very familiar with those papers. The package of papers sent to Prince & Co. was either this batch of papers, or an original duplicate batch. It was customary for Coffin & Stanton, when purchasing bonds, to have copies of an original paper to be used in a case of this kind, when they disposed of bonds, and it was so in this case.

In the package of papers sent to Prince & Co., the notice of special election, headed "Notice of special electi- to the qualified electors of the city of Santa Cruz, and to all whom it may concern," was included.

In connection with the testimony of this witness, said package of papers, comprising:

(1) Copy of ordinance No. 314; (2) copy of ordinance No. 315; (3) copy of ordinance No. 317; (4) copy of ordinance No. 318; (5) copy of ordinance No. 320; (6) copy of notice of sale of bonds, dated March 28, 1894, signed O. J. Lincoln, city clerk of said city of Santa Cruz; (7) affidavit of O. J. Lincoln, dated March 15, 1894, showing posting of notice of a special election to be held in said city of Santa Cruz on the thirteenth day of March, A. D. 1894; (8) copy of notice of special election; (9) certificate of O. J. Lincoln, city clerk, to the correctness of copies of other papers contained in package.

442 All of which papers are marked with the seal of the city of Santa Cruz.

Embodied in said copy of notice of special election is the following: "(2) Eighty-nine (89) first-mortgage bonds (with interest thereon from November 1, 1893) of the corporation the City Water Company of Santa Cruz, heretofore issued by said corporation, the City Water Company of Santa Cruz, which bonds bear date May 1, 1890, and are of the denomination of one thousand dollars ($1,000) each, and bear interest at the rate of six (6) per cent. per annum, payable semi-annually, and are secured by a mortgage or deed of trust upon the property known as the city water works of the city of Santa Cruz, executed by the City Water Company of Santa Cruz as party of the first part therein, to the Holland Trust Company, of New York, as trustee, party of the second part therein, and which said bonds outstanding were, at the time of the conveyance by the City

Water Company of Santa Cruz to the city of Santa Cruz of the property known as the city water works, and now are, a valid lien and charge upon said property known as the city water works, and became thereby a part of the bonded indebtedness of the city of Santa Cruz."

The papers sent to F. H. Prince & Co. contained the certificate of O. J. Lincoln, city clerk of the city of Santa Cruz, dated twenty-fourth of April, A. D. 1894, and in the package of papers sent to F. H. Prince & Co., either that certificate, or a duplicate original, was contained.

At this point certain papers were exhibited to the witness as follows:

443 (1.) Certificate of O. J. Lincoln, as follows:

"SANTA CRUZ, CAL., *April* 27, 1894.

STATE OF CALIFORNIA, } ss:
County of Santa Cruz, City of Santa Cruz, }

I, O. J. Lincoln, city clerk of the city of Santa Cruz, State of California, do hereby certify that, to the best of my knowledge and belief, the present population of the city of Santa Cruz will exceed 6,500.

Attest my hand and the seal of said city this twenty-seventh day of April, 1894.

O. J. LINCOLN, *City Clerk.*

(Seal of city of Santa Cruz attached.)".

(2.) The following "statement of the population and valuation of the city of Santa Cruz:"

"Present population, 6,500. With the annexation of East Santa Cruz, which is probably about 1,500, would be added, making a total population of 8,054.

Assessed valuation in 1893	$3,907,404
Real valuation	8,100,000
Real valuation of East Santa Cruz (estimated)	540,000
Total valuation	$8,640,000
Total bonded debt	360,000

Floating debt, none.

The annexation of East Santa Cruz would not increase the debt."

There was added to such statement the certificate of O. J.

444 Lincoln, city clerk of the city of Santa Cruz, that said statement was true and correct according to the best of his knowledge and belief.

(The witness continued:) I have seen those papers before; either they or duplicate originals were a part of the papers sent to Prince & Co.

(The papers were then read in evidence.)

(The witness continued:) There was an agreement in writing between the city of Santa Cruz and Coffin & Stanton. I do not think

that agreement was among the papers sent to Prince & Co. Mr. Prince, in the course of the conversation between him and Mr. Stanton, stated that he desired the papers which were afterward sent him for submission to Messrs. Story & Thorndyke, attorneys.

During my examination, I have testified: "The transaction was concluded and refunding bonds of the city of Santa Cruz were forwarded to Messrs. Prince & Co. with a draft attached." I will explain what I mean by "a draft attached" as follows: The firm of Coffin & Stanton had sold quite a large amount of these bonds to Prince & Co., and they were not all obtainable at one time, and we sent them in such lots as were available, with drafts attached to them for the amounts of such bonds, and placed them in the bank for collection, and drew upon them by a draft for the amount of the bonds sent.

WALTER STANTON, recalled on behalf of the defendant, testified as follows:

Q. What relation did the firm of Prince & Co. have with the firm of Coffin & Stanton, if any, in the matter of the sale of the Santa Cruz refunding bonds?

445 The question was objected to by the plaintiff as incompetent, in that it called for the conclusion of the witness.

The objection was overruled, and an exception taken by the plaintiff.

A. They were principals.

Q. Were they your agents?

Same objection, same ruling, and exception taken.

A. No, sir.

(The witness, continuing, testified:) The sale of the bonds was made to F. H. Prince & Co. So far as the firm of Coffin & Stanton were concerned, we never heard of any one else in connection with the transaction. It is my best recollection that Mr. F. H. Prince did not disclose the name of his client in any interview he had with us. We were not clients of F. H. Prince & Co. in this transaction. Our office manager, Mr. Turney, had charge of the matter of sending to Price & Co. the papers relating to the Santa Cruz refunding operation. I instructed him to send the Santa Cruz papers to F. H. Prince & Co., of Boston. Those papers were all kept in one package, and, when I stated the "Santa Cruz papers," I meant all papers in connection with the Santa Cruz bonds.

I remember that Mr. Prince stated that the papers had been placed in the hands of an attorney, and since hearing the recollection of Mr. Turney, it is my impression that Mr. Prince stated Story & Thorndyke. I obtained from the City of Santa Cruz the full record of proceedings with the papers giving the assessed valuation and calculation, and all ordinances, etc., that had been passed in relation to the refunding bonds, and they were certified to by

the city clerk, Lincoln, and those papers were undoubtedly
446 in the package endorsed as the "Santa Cruz papers," and which I directed Mr. Turney to send to Boston.

(On cross-examination, the witness testified:) When I stated that the relations of the firm of Prince & Co. with the firm of Coffin & Stanton, in the matter of the sale of the Santa Cruz refunding bonds, was that of "principal," and that Prince & Co. were not our agents, I was answering to the best of my recollection.

At this point the witness was handed a letter, which letter read as follows:

"Coffin & Stanton, bankers, New York, London.

72 BROADWAY, NEW YORK, *Sept.* 24, 189–.

Messrs. F. H. Prince & Co., 2 and 8 State street, Boston, Mass.

GENTLEMEN: We have to acknowledge yours of the twenty-second inst., reporting to us the trade which you have arranged for us with Messrs. E. & E. G. Wallace. We hereby confirm that trade, and agree to deliver $150,000 City of Santa Cruz, Cal., bonds at par, of the earliest date of maturity which we hold, and $150,000 City of Ironwood, Mich., 6 per cent. at 105 and interest, we to satisfy Judge Dillon, or some other lawyer satisfactory to you, of the legality of these bonds, and furnish a legal opinion from him to that effect. We agree to take in part payment of the above bonds 520 shares of common and 350 shares of preferred stock of the Page Belting Co., at 85 per cent. of their par value, as follows: Half of said
447 stock on delivery of $150,000 City of Santa Cruz bonds, together with cash for the balance of the purchase-money for said bonds, and the other half of said Page Belting Co. stock on delivery of the $150,000 City of Ironwood bonds. And we further agree to deposit with you $10,000 City of Waco, Texas, first-mortgage water company 6 per cent. bonds, and the 435 shares of Page Belting Co. stock received by us on delivery of the $150,000 of the City of Santa Cruz bonds, as surety that we will perform the above agreement in full, and by delivery — $150,000 City of Ironwood bonds on the conditions above named, and receiving the remaining one-half of the Page Belting Co.'s stock—that is, 435 shares as part payment therefor. $150,000 City of Santa Cruz bonds are to be delivered on Tuesday next.

Very truly yours, COFFIN & STANTON."

(The witness continued:) The letter which you have handed me bears the signature of Coffin & Stanton. To my best recollection, I have never seen that letter before.

The letter was then read in evidence on behalf of the plaintiff.

(The witness continued:) The signature to that letter is Mr. Coffin's. I did not write that letter, and have no recollection that I ever saw it before. I think that some of the negotiations between Prince and Coffin & Stanton were carried on between Mr. Prince and Mr. Coffin. I have no recollection that I have ever seen the letter of Prince & Co. of the twenty-second, referred to in this letter.

If I had received that letter that you mention from Prince &
448 Co., advising us of the contract they had made in reference to the Santa Cruz bonds, I would probably have answered it and signed it. I have no recollection of any such arrangement as that Mr. Prince testified to in substance, that I arranged with him over the telephone to pay him, as a commission for the sale of the $150,000 Santa Cruz bonds, one-half of the profits, if any, which were obtained on the Page Belting Company's stock.

The following question was then asked the witness:

Q. Do you recollect any arrangement by which you were to pay Prince, as a commission for placing the Ironwood bonds, half of the profits of the interest money on those bonds?

To which question defendant objected on the grounds that it was entirely irrelevant and incompetent, and had nothing to do with the case.

The objection was by the court overruled; to which ruling of the court defendant duly excepted, and the witness answered: "There must be some paper in existence showing the exact relations of Coffin & Stanton and F. H. Prince & Co. in this matter. This transaction was carried on some four years ago, and at a very anxious and worried time for the firm of which I was a member, and as to my recollection of these various bonds that you refer to, it is very difficult for me to form an absolute recollection of any one bond excepting just the best I can by groping at it. On my direct examination I stated the best that I could remember. Now, when you call for these different bonds, it is absolutely impossible for me to remember."

(The witness continued:) To the best of my recollection,
449 Prince & Co. were not our agents. It is not a belief; it is a recollection in regard to it. I heard Mr. Turney testify; and Mr. Turney had charge of the details, and it led my mind to that way of thinking. The recollection was that Mr. Prince did not act as an agent. He acted as a principal. Even now, with this letter before me, I do not remember the name of Wallace. I knew that Mr. Prince had a customer for those bonds. I recollect very distinctly about that on reading the letter that you handed me.

Of the facts on which I base my conclusion that Prince was not our agent, the first that impressed me was that I have no recollection of any transaction in which Mr. Prince was our agent prior to this. So far as I can remember, that has the strongest bearing upon my recollection. If he acted as our agent in this matter, it was an individual case. I cannot say that I have any recollection of any facts, one way or the other.

My statement in my redirect examination that Prince was not acting as our agent is based on Mr. Turney's testimony and the fact that I cannot recollect that Prince acted as our agent in any other case. I have no recollection of any agreement with Prince & Co. by which we were to pay them half of the profits of the interest money on the Ironwood bonds, as their commission for placing the bonds.

The witness was then asked the following question by counsel for plaintiff:

Q. I ask you whether you recall receiving a letter from F. H. Prince & Co., as follows:

450 "SEPTEMBER 22, 1894.

"Coffin & Stanton, 72 Broadway, New York:

"You agreed with us last night that we should divide the interest of Ironwood bonds, and you must stand by it.

F. H. PRINCE & CO."

To which question defendant objected on the grounds that the same was irrelevant and incompetent; which objection was by the court overruled; to which ruling the defendant then and there duly excepted, and the witness answered: "I have no recollection. I was away from the city at the time that letter was sent."

(The witness then continued:) I do not know that this transaction was closed on September 22.

The witness was then asked the following question by counsel for plaintiff:

Q. Have you any doubt, from the examination of letter signed by your partner, marked "Plaintiff's Exhibit 1," "of this date," that the transaction was closed, at that date, September 22 or 23; should you not say that the contract was closed on that day?

To which question the defendant objected on the ground that the same was incompetent; which objection was by the court overruled; to which ruling of the court defendant then and there duly excepted; and the witness answered "Yes."

(The witness continued:) I do not remember whether I was in town or not at the time the contract was made. The various interviews between Mr. Prince and myself in reference to these
451 negotiations took place over the telephone, I think. I have an indistinct recollection that there was one, or perhaps two, personal interviews between Mr. Prince and myself at my office. I recollect that Mr. Prince said that he was to give the papers to an attorney; and then Mr. Turney states that the attorney was Story & Thorndyke. That conveys an impression to me that it probably was Story & Thorndyke, as far as I could remember. I have no definite recollection to the effect that Prince said to me he wanted those papers sent to Story & Thorndyke, but my impression is that he did.

Mr. Prince said nothing to me about obtaining Mr. Dickinson's opinion. If it is a fact that Mr. Prince did take in Mr. Dickinson, and wanted the papers for that purpose, that fact would not change my impression that Messrs. Story & Thorndye's name was used, because Mr. Dickinson might have been taken in in addition. I think that Mr. Prince made the statement about the use he desired to make of those papers over the telephone. I am not positive. As far as I recollect, all that he said at that interview was that he wanted additional papers given to his attorney, and that is all that I absolutely recollect, although it is my impression that he said he

wanted them for Story & Thorndyke. I do not know who has the letters and papers of Coffin & Stanton. Thomas P. Wickes is their present receiver.

The plaintiff here offered in evidence a copy of a letter from F. H. Prince & Co. to Coffin & Stanton, dated September 22, 1894, as follows:

452 "SEPTEMBER 22, 1894.

"Coffin & Stanton, 72 Broadway, New York:

"You agreed with us last night that we should divide the interest on Ironwood bonds, and you must stand by it.

"F. H. PRINCE & CO."

The defendant objected on the ground that the evidence is inadmissible, irrelevant, immaterial and incompetent. Thereupon the court overruled the said objection; to which ruling the defendant duly excepted; and the letter was read in evidence.

On redirect examination the witness stated as follows: Prior to this transaction, the firm of Coffin & Stanton had no interest whatever in the Page Belting stock, and whatever dealings there were as to the sale of the Page Belting stock were not made in our behalf. We had no interest in that whatever, in any shape or form. The offer to give us Page Belting stock was necessarily made by Prince, either as the owner, or representing the owner. In no possible aspect could Prince have been the agent of Coffin & Stanton in the sale of the Page Belting stock.

CLARENCE D. TURNEY, recalled, on recross-examination stated: My understanding of Mr. Prince's statement was that he represented a client who was to purchase bonds of Coffin & Stanton. He mentioned the Page belting stock, which was to be part of the consideration for the bonds sold by Coffin & Stanton. This conversation took place in the private office of our firm. I have no definite knowledge as to how long before the contract was signed it occurred, as I do not know when the contract was signed, or
453 that a contract was signed. On that particular occasion I was present at the whole conversation. The transaction for the sale of these bonds had been concluded between the members of the firm of Coffin & Stanton and Mr. Prince, and as I was the office manager, in charge of many details of the firm's business, I was called in at that conference so as to understand the nature of the transaction, and in order that I might see that the details were fully carried out. The conversation related to the amount of bonds that were sold, the price at which they were sold, and the consideration therefor, which was composed—I cannot remember the whole conversation, or any part of it verbatim. Mr. Stanton outlined the nature of the transaction with Mr. Prince, and stated to me that they sold a certain amount of City of Santa Cruz refunding bonds to F. H. Prince & Co., at a price which I do not at this moment recollect; and that a certain amount of it was to be paid in cash; that the bonds were to be partly in the stock of the Page Belting Com-

pany at an agreed price; instructing me to arrange to get the bonds and deliver them to F. H. Prince & Co., drawing upon them for such amounts as were due Coffin & Stanton; and also instructed me to get up the necessary papers touching upon the issue of these bonds. That was the substance of the conversation I had with the firm, with Mr. Prince present. I cannot state positively that at that meeting Mr. Prince made any statement that he represented a client. If I stated a short time ago that it was at that meeting that Mr. Prince made the statement with reference to a client, I wish to correct the statement. There were a number of meetings between Mr.
454 Prince and the firm. At some of the meetings I was called in for some purpose or other, but I would only be there a few minutes, perhaps. I heard Mr. Prince state to the firm at one of these meetings that he represented a client in the purchase of the bonds.

I have never seen "Plaintiff's Exhibit 1 of this date" until today. I have no recollection whether the final letter setting forth this trade was shown to me, so that I might draft the papers, or for any other purpose. If there had been a contract, which there doubtless was, I would have had access to it in order that the details may have been perfected.

If this letter ("Plaintiff's Exhibit 1" above referred to) was the only contract, it would not necessarily have passed through my hands. Mr. Prince called at the office very frequently about that period. I presume that it was in connection with this transaction. I was present at two or three of the interviews held in reference to this transaction. I don't recollect any conversation between Mr. Prince and either Mr. Coffin or Mr. Stanton in which anything was said as to Prince's receiving, as a commission for sale, a portion of the profits that Coffin & Stanton might make on the Page Belting stock, nor any conversation in which anything was said about their division of the interest on the Ironwood bonds. This letter of November 22, from Prince & Co. to Coffin & Stanton, which you now show me, I have not the slightest recollection of, nor of its subject-matter.

I stated on my direct examination that the only party whom I knew in the transaction was Prince & Co. It was my belief
455 and understanding that Mr. Prince bought them for a customer. This belief was based upon what he said.

It was to Prince & Co. that we looked for our pay; that is, for the payment for the bonds and consummation of the transaction; and it was on Prince & Co.'s responsibility that we relied. I identified several papers that were forwarded *to* me to Prince & Co. on my direct examination. There was a printed transcript of the proceedings had, several certificates of the city of Santa Cruz relating to the issue of the bonds, also several certificates executed by O. J. Lincoln, who then was city clerk of Santa Cruz.

That is all that I have any recollection of without looking at the papers.

I remember what papers were sent, because I handled those several papers on a number of occasions in connection with those bonds.

I knew they were regarded as a set of papers relating to the issue of those bonds, and to the best of my recollection at the present time those papers were considered as a set of papers relating to the issue of those bonds. Another thing, they were unusual, those papers. Ordinarily, papers relating to the issue of bonds were typewritten, or were gotten up in manuscript form. These were the first set of papers in my experience on the street that were gotten up in just that form. It therefore made a great impression. Speaking for myself personally, my impression is that I did not receive the papers that I sent to Prince & Co. back again.

It was in a general conversation that I heard Mr. Prince remark that he desired the papers for submission. This remark was made at the conference which I have previously attempted to give the whole of; and this was something that I did not remember
456 when I tried to give the whole. I can't state definitely just what he said about that, further than the statement was identically made that those papers were forwarded to be submitted to Story & Thorndyke. The papers were mailed to him.

Q. Did you mail them yourself?

A. No.

Q. Did you see them mailed?

A. I told——

Q. Did you see them mailed?

A. No, sir; I did not.

Q. Did you hear anything at that time said about Mr. Dickinson?

A. No; I never heard Mr. Dickinson's name.

On redirect examination the witness stated: In speaking of this transaction, Mr. Prince spoke "of my customer." I never knew until my examination who the customer was. He stated that the transaction was for a customer of his. It is my recollection that before Coffin & Stanton sold these bonds to Prince & Co., Prince & Co. had arranged the matter of the sale with their customer. The bonds were not sold by Prince & Co. on behalf of Coffin & Stanton to the customer of Prince & Co. My understanding is based upon what occurred in my presence and in conjunction with the frequent instructions I received. Papers, of which we had a great number, were selected generally by Mr. Stanton and myself, and such papers as we thought essential to establish the title of the bonds were selected to be forwarded to F. H. Prince & Co., according to their previous instructions. Among such papers I am confident that "Exhibit A," or another original copy of same, was sent; also two certificates signed and executed by O. J. Lincoln, city clerk of Santa Cruz, in connection with the valuation, population, and giv-
457 ing other statistics of the city. I am positive that a special election notice, as I before testified, was among them. I refer to this special election notice in "Defendant's Exhibit A" of October 12, 1897, or one exactly like it. I am positive of that.

On cross-examination by Mr. Cobb, on behalf of the plaintiff, the witness stated: Yes, I am pretty familiar with the dealings of Coffin & Stanton and the city of Santa Cruz. I had a very good

general knowledge of the relations between the city and the firm. I selected the papers to be sent to Prince & Co., which in my judgment sustained the title to the validity of the bonds. I don't know that at the time I took any special notice that it was stated in the election notice that the bonds were to be used for refunding the bonds of a private water company. I know the election notice was in that batch of papers, and they were all tied together, and I regarded that batch as necessary papers. The papers had been received prior to that by attorneys for the firm; and these papers were a set of papers that were very thoroughly impressed upon me at the time, and I bore it in mind. When I had the papers sent to Prince & Co., I had no knowledge of the merits of the papers at all.

On redirect examination the witness stated: It is a fact that I sent those papers because the attorneys of the firm in New York placed them in a set.

At the conclusion of the reading of this deposition, the defendant offered in evidence all the exhibits attached by the notary to the depositions, which exhibits are above referred to, and they were considered read.

458 FREDERICK H. PRINCE, a witness called on behalf of the defendant, testified as follows: My name is Frederick Henry Prince. I live at the city of Boston, and am a banker. In 1894 I had dealings with the firm of Coffin & Stanton, of New York, in respect to the refunding bonds of the city of Santa Cruz, California. Those dealings were as agent for Coffin & Stanton. I sold for Coffin & Stanton 150 bonds to E. G. & E. Wallace. The bonds were of the par value of $1,000 each, and represented $150,000. They were the 5 per cent. refunding funds of the city of Santa Cruz. I did not buy those bonds on behalf of myself or my firm. On September 22, 1894, I sold them to E. G. & E. Wallace. I had been negotiating the sale with Messrs. E. G. & E. Wallace for two or three weeks before the sale was consummated. During that time the bonds were in the possession of Coffin & Stanton, I suppose. They were not in my possession. I had not paid for the bonds before the sale to Messrs. Wallace was completed. As I remember it, at the time the sale was completed, Wallace paid me a certain sum of money, and Coffin & Stanton drew on me the same day for part of the bonds.

I was the agent of Coffin & Stanton, and if there was any profit I was to receive a profit, if there was any in the transaction. I was to share in any profit that Coffin & Stanton made in that transaction. I was to get a share of what profit there was in the disposition of the Page Belting stock, which was taken in part payment, you understand, for those bonds.

We sold the bonds at par, and Coffin & Stanton took Page
459 Belting stock at 85 per cent. from the Messrs. Wallace, who paid the difference in cash—the difference between 435 shares of Page Belting stock taken at 85, and 150 Santa Cruz bonds at par and interest.

E. G. & E. Wallace paid us $16,400, and the balance, $100,000

we loaned them on the Santa Cruz bonds; which $100,000, with the $16,400, was paid over to Coffin & Stanton. We were to receive for our compensation a certain share of any profits that would be realized by Coffin & Stanton on the sale of this Page Belting stock above 85, at which they took it. We were paid $2,500 by E. G. & E. Wallace for selling the Page Belting stock and for other services in connection with the transaction. I suggested to the Messrs. Wallace that they buy the Santa Cruz bonds, and they authorized me to buy them. I stated to them that Coffin & Stanton in New York, I thought, were hard up for money, it being then in the middle of one of our panics, and I thought that by advancing this amount of money he could get them to buy this manufacturing stock in exchange. Messrs. E. G. & E. Wallace had spoken to me previously about selling that Page Belting stock before I broached this purchase of the Santa Cruz bonds, and they had told me I could sell the belting stock if I could. My impression is that the Page Belting Company was a New Hampshire corporation, and that the Messrs. Wallace were stockholders in it. It is a very well known concern in the city of Boston.

These negotiations commenced some time in July, and culminated in September. Coffin & Stanton made inquiries in regard to the Page Belting stock on their side, and then the transaction, being so large in size as that, would necessarily take a considerable
460 time. The loan of $100,000 to Messrs. Wallace was made at their request and was a condition of our making the transaction. It is my business to loan money. I received no security from Messrs. Wallace for this loan of $100,000. I held the bonds of security for it. Messrs. Wallace gave their note for $100,000 with the bonds as collateral. That was an ordinary promissory demand collateral note. I don't know whether the Messrs. Wallace made any inquiry as to the legality or validity of the Santa Cruz bonds. We employed attorneys to make investigation, and to give an opinion as to the legality of the bonds. We employed Mr. M. F. Dickinson. Story & Thorndyke were our private counsel, and they were called upon by us to investigate into the legality of these bonds, and to give an opinion. During the long negotiations between July and September, the Messrs. Wallace asked us whether we had called upon any attorneys for their opinion as to the legality of these bonds. It is always customary, in a sale of bonds, to give a lawyer's opinion that the bonds have been properly examined; and in this case I think there were three opinions. Messrs. Wallace asked us what opinion we had in regard to the bonds being properly issued, and we gave them Mr. Dickinson's opinion, and also the opinion of some lawyer in New York, whose name I do not recollect, and also the lawyer out in California. Coffin & Stanton sent us all the papers relating to the issue of these Santa Cruz refunding bonds, and we submitted them to Mr. Dickinson, whom we consulted before we consulted Story & Thorndyke.

I do not remember what papers we received from Coffin & Stanton and handed over to these attorneys, but I know
461 Coffin & Stanton always sent a very full set of all papers, you understand. And in this case, as I remember it, there

was a very full set of papers—votes and so forth. I couldn't swear positively, but it is my impression that all the ordinances of the city of Santa Cruz, the advertisement and the contract with Coffin & Stanton, were submitted. They were very careful to send all the papers. That is my best memory.

I have looked at the papers which you now hand to me purporting to be copies of the contract between the City of Santa Cruz and Messrs. Coffin & Stanton. They were not among the papers sent to us. I never saw them before. This contract was not among the papers. This is the first time I have ever seen it. I have read both of them here, but I never saw either of them before. I am positive of that. It is my best memory that a contract between the City of Santa Cruz and Coffin & Stanton was among the papers, but it was not that contract. I cannot tell you in what way it differs. This is the first time I have seen these two contracts, or the copies of the contracts, or the conditions connected with the same.

Q. You see, Mr. Prince, that one paper which I will now have marked "Exhibit A for identification," and which you looked at a few moments ago, purports to be certified by the city clerk as "a true and correct copy of a contract filed in the office of the city clerk of the city of Santa Cruz on the sixteenth day of April, A. D. 1894," which contract is between Coffin & Stanton and the City of Santa Cruz. Does that refresh your memory?

A. I never saw this contract, and never knew of it. I
462 never saw the original, and never saw the copy. And the other paper which you hand me, marked "Exhibit B," for identification, and certified by J. L. Wright, city clerk of the city of Santa Cruz, to be a true and correct copy of a contract spread upon the minutes of the common council of the city of Santa Cruz, as contained on pages 226 and 227 of volume 3 of minutes of the common council, was never seen by me before, neither the original nor a copy.

I do not remember that anything was said to Messrs. E. G. & E. Wallace that these refunding bonds had been issued to take up the bonds issued by a private water corporation. I received an opinion from Messrs. Story & Thorndyke as to these bonds, which opinion was in writing. The opinion was not that they were not legally issued. I do not know what has become of that opinion. I have made a general examination of my papers and cannot find it. I had correspondence with Messrs. E. G. & E. Wallace with reference to these bonds, and the letters are at my office.

It is customary in selling bonds to give a Boston lawyer's opinion in reference to the same. The opinion of the Californian lawyer and the New York lawyer were sent to me with the papers by Coffin & Stanton. I think Dickinson gave us his opinion, and then we called on Story & Thorndyke, our private lawyers, for their opinion. After we originally got papers from Coffin & Stanton in connection with these Santa Cruz bonds, Dickinson asked for certain papers, which were sent for to Coffin & Stanton, and they sent them to us. That was subsequent to the first papers sent us, and

before Dickinson gave his opinion. As I remember it, he
463 asked for some papers, that we sent for them, and they were given to him. Coffin & Stanton supplied us with all the necessary sworn statements of all kinds and descriptions. What I mean is, Coffin & Stanton supplied us with a number of papers. Story & Thorndyke were our regular paid solicitors, and sent their bill in quarterly.

On cross-examination the witness stated: I do not remember or recollect any conversation with Messrs. E. G. & E. Wallace in reference to the matter that these bonds were given to refund the bonds of a private water company.

We were to be paid by Coffin & Stanton, as compensation for our services in placing these bonds, one-half of the profit made by Coffin & Stanton on the Page Belting stock, if any, over and above $85 a share. I think I am right. I don't know whether it is a half or a third. In this transaction, that was the only compensation we were to receive from Coffin & Stanton. We were not to receive a part of the profits of Coffin & Stanton on the sale of the Santa Cruz bonds; none whatsoever, I am sure about that. Whatever profit there was to Coffin & Stanton on the sale of those bonds was to have gone entirely to them.

I have an impression—it is only an impression—that there was some contract among the papers originally sent us by Coffin & Stanton between the City of Santa Cruz and Coffin & Stanton. I know that Coffin & Stanton always sent over papers, that were always sworn to, of all sorts and nature, and there was a number of papers, and my impression is that the contract with the city was there. A sworn statement was what they always sent over.
464 They had a notary in their office, and he always swore to everything.

On redirect examination the witness stated: We received $2,500 compensation from the Messrs. Wallace for the sale of the belting stock. I told Messrs. Wallace that I had received an opinion from Mr. Dickinson, and from lawyers in New York, and from Story & Thorndyke, and a lawyer in California, with reference to the legality of these bonds.

At this point the witness stated as follows: I would like to correct a piece of my testimony that was given this morning, and that was: I said I had an opinion from Story & Thorndyke in regard to the bonds. As a matter of fact, as I now recollect, I never had an opinion from Story & Thorndyke in regard to the bonds, no written opinion. I had a letter of inquiry which I have hunted for and cannot find. I have no recollection whatever as to the contents of that letter. I have brought with me copies from our letter book of all letters written by us to the Messrs. Wallace and received by us from them relating to this transaction; and these letters which I now produce are correct copies.

The letters referred to by the witness are now offered and read in evidence as follows:

"BOSTON, *August* 31, 1894.

Messrs. E. G. & E. Wallace, Rochester, N. H.

GENTLEMEN: As instructed by you, we have negotiated with Messrs. Coffin & Stanton to sell to you the $360,000 City of
465 Santa Cruz, Cal., 5 per cent. bonds, dated April 16, 1894, at par and interest, they agreeing to accept, in payment therefor, 350 shares of Page Belting Company preferred stock at par; 520 shares of Page Belting Company common stock at 85, and the balance in cash. The legality of this issue of bonds has been passed upon by Mr. M. F. Dickinson, Jr., of the law firm of Messrs. Hyde, Dickinson & Howe, the attorneys of the American Loan & Trust Company, and we enclose his written opinion, which kindly return to us for our files. Please notify us when it will be agreeable to you to carry through the transaction. Our charge to you for services in this matter will be $2,500, as already arranged with Mr. Summer Wallace.

Very truly yours, F. H. PRINCE & CO."

"BOSTON, *Sept.* 22, 1894.

Messrs. E. G. & E. Wallace, Rochester, N. H.

GENTLEMEN: We enclose herewith copy of letter to Messrs. Coffin & Stanton explaining the trade which we have made for you with them. You are to pay us $2,500 as agreed, for our services to you in this matter.

Very truly yours, F. H. PRINCE & CO."

"SEPT. 22, 1894.

Messrs. Coffin & Stanton, New York, N. Y.

GENTLEMEN: We have arranged a trade for you with Messrs. E. G. & E. Wallace, as follows: We have sold $150,000 City
466 of Santa Cruz, Cal., bonds at par, you to deliver the bonds of the earliest date of maturity which you hold, on Tuesday next, and $150,000 City of Ironwood, Mich., 6 per cent. bonds at 105 and interest, you agreeing that the legality of the City of Ironwood bonds shall be satisfactory to Judge Dillon, and a legal opinion obtained from him to that effect, and if not from him, from such a lawyer as may be agreeable to us. You are to take in part payment of the above bonds 520 shares of common and 350 shares of preferred stock of the Page Belting Co., at 85 per cent. of its par value as follows: Half on delivery of $150,000 City of Santa Cruz bonds, and the other half on the delivery of the $150,000 City of Ironwood bonds, you to deposit with us $10,000 City of Waco, Tex., first-mortgage water Co. 6 per cent. bonds, and the 435 shares of Page Belting Co. stock received by you on delivery of $150,000 City of Santa Cruz bonds, as surety that you will perform in full the above agreement in delivering the $150,000 City of Ironwood bonds on the conditions above named, and receiving the remaining one-half of the Page Belting Co. stock, that is, 435 shares, as part payment thereof. The balance of purchase-money for each lot of bonds is to be paid in cash on the delivery of bonds.

Please confirm the trade by signing the enclosed letter and returning same to us forthwith.

Very truly yours, F. H. PRINCE & CO."

467 "OCTOBER 16, 1894.

Messrs. E. G. & E. Wallace, Rochester, N. H.

GENTLEMEN: As we telephoned you today, we should like to have you pay us on Friday, the nineteenth inst., $50,000 on account of your demand loan on Santa Cruz bonds. We have had a loan on these bonds called, and, as we have large payments to make at the present time, we shall need this money.

We note you will call on us Friday.

Very truly yours, F. H. PRINCE & CO."

"OCTOBER 17, 1894.

Messrs. E. G. & E. Wallace, Rochester, N. H.

GENTLEMEN: We have your favor of the sixteenth inst., and note that you do not wish to do anything in this matter until the return of Mr. Summer Wallace. Our understanding with him was that we were to loan this money on demand, and as we have large payments to make the last of the week, we should like at least $50,000 on Friday. If you cannot pay us this amount, please pay us $25,000, and let the balance go until the first of next week.

Very truly yours, F. H. PRINCE & CO."

"ROCHESTER, N. H., *August* 5, 1894.

F. H. Prince, Boston:

468 Don't care to make trade less than par all around, both common and preferred.

E. G. & E. WALLACE."

On recross-examination the witness stated:

The statement that I did not state to Messrs. E. G. & E. Wallace anything about Story and Thorndyke's opinion is correct:

On redirect examination the witness stated:

By Mr. DITTENHOEFER:

Q. Now, what is it you wish to have understood as to your answer, that you did not inform the Messrs. Wallace that you received an opinion from Story and Thorndyke, or merely that you did not inform them that they had given you an opinion that the bonds were illegal?

A. I want to have understood that I do not remember to have informed Messrs. E. G. & E. Wallace that I had an opinion from Messrs. Story and Thorndyke, and also that I distinctly remember that I did not inform them that Story and Thorndyke had given me an opinion that the bonds were illegal, because they did not do so.

The defendant here moves to strike out from the last answer the

words "because they did not do so" as not being responsive to the question. The motion to strike out was by the court denied and an exception duly taken by the defendant.

(The witness, continuing:) Story and Thorndyke did not give us any opinion. I can say that they gave me no opinion that the bonds were illegal, because they did not give me any opinion on them anyhow. They did not give me any opinion as to
469 whether they were legal or illegal. I conferred with them as to the bonds, but had no opinion from them as to their legality or illegality.

WILLIAM H. FLEMING, a witness on behalf of defendant, testified as follows:

My name is William H. Fleming; I live at Cambridge, and I am a clerk for F. H. Prince & Co., having been with them twelve years. I have no interest in the business. I remember that there was a transaction between F. H. Prince & Company, and Coffin & Stanton and Messrs. E. G. & E. Wallace in the year 1894. I don't remember any particular part that I took in such transaction. I may have, but I don't remember. During the time I remember seeing either one or both of the Messrs. E. G. & E. Wallace at the office of F. H. Prince & Company some time between July and September. I found an entry on the books of F. H. Prince & Company relating to the transaction ceoncerning the sale of the Santa Cruz refunding bonds to Messrs. E. G. & E. Wallace.

Q. Does the entry correspond with the testimony given by Mr. Prince?

Objected to by the plaintiff as immaterial; which objection was by the court sustained; to which ruling of the court sustaining the objection the defendant duly excepted.

Q. Will you please turn to the page of that book containing the entry and read the entries?

Objected to by the plaintiff as immaterial; which objection was by the court sustained; to which ruling of the court sustaining the objection defendant duly excepted.

The entry referred to was as follows:

470 Page 952, Stock Ledger No. 4.

E. G. & E. Wallace.

1894.			
Sept. 22.	8 per cent. Page Belting Co. rec'd.		
25.	150,000 Santa Cruz, 5's, 100		$150,000
	Int. at 5, 162 days		3,375
	Comm. F. H. P. & Co., as ag'ts		2,500
			$155,875

1894.

Sept. 25.	435 Page Belting Co., 85	$36,975
	Demand loan	100,000
	C'k	18,900
		$155,875

Mr. FLEMING:

Q. What does the word "rec'd," on the first line, mean—"received"?

Counsel for plaintiff objected to the question on the ground that the same was immaterial. The court sustained the objection, to which ruling defendant then and there duly excepted.

Q. What does the figure "5" and the letter "s" after "Santa Cruz" mean?

Council for plaintiff objected to the question on the ground that the same was immaterial. The court sustained the objection, to which ruling defendant then and there duly excepted.

Q. What does "5's" mean?

Council for plaintiff objected to the question on the ground that the same was immaterial. The court sustained the objection, to which ruling defendant then and there duly excepted.

471 Q. The words "int. at 5 162 days," on the third line—what does that mean?

Counsel for plaintiff objected to the question on the ground that the same was immaterial. The court sustained the objection; to which ruling defendant then and there duly excepted.

Q. The words "comm. F. H. P. & Co. as ag'ts"—what does the word "comm." mean? Commission?

Counsel for plaintiff objected to the question as immaterial. The court sustained the objection, to which ruling defendant then and there duly excepted.

Q. And "F. H. P. & Co." mean "F. H. Prince & Company"?

Counsel for plaintiff objected to the question on the ground that the same was immaterial. The court sustained the objection, to which ruling defendant then and there duly excepted.

The foregoing comprises all of the evidence produced upon the trial of said cause.

The cause was thereupon argued orally and upon briefs by counsel for the respective parties and submitted to the court for consideration and decision. Thereafter, on the twenty-ninth day of September, 1898, the court made and filed the cause in favor of the plaintiff and against the defendant.

Thereafter, in due time, defendant moved the court for a new trial of said cause upon the following grounds:

(1.) Insufficiency of the evidence to justify the said decision.

(2.) That said decision is against law.

472 (3.) Errors in law occurring at the trial and excepted to by the defendant.

And pending said motion defendant duly moved the court to make certain additional findings as hereinafter set forth, and duly excepted to certain findings of the court as hereinafter set forth.

The court thereupon made and filed certain additional findings of fact, as the same appear in the judgment-roll, but refused to make the following additional findings of fact:

Defendant requested the court to make the following additional findings of fact, viz: "Amend finding No. 12 by inserting after the words 'E. G. & E. Wallace,' in line twenty-seven, on page ten, the following: 'Before purchasing said bonds, said firm of E. G. & E. Wallace asked for the opinion of some attorney in Boston, known to the firm, upon the question of the validity of the bonds and, after consultation, it was decided to refer the question to Mr. M. F. Dickinson, Jr., an attorney of the city of Boston. Prince & Company thereupon employed and consulted said Dickinson in regard to the validity of the bonds in question, and submitted to him copies of said ordinances numbered 314, 315 and 320 of the city of Santa Cruz; after examining which, said Dickinson rendered a written opinion in favor of the validity of the bonds, which opinion was furnished to and received by said firm of E. G. & E. Wallace prior to their purchase of the bonds in question. But said Dickinson did not communicate his knowledge of said ordinances, or any of them, to said E. G. & E. Wallace.'"

The court refused to make said additional finding as
473 requested by defendant, to which ruling and action of the court defendant thereupon duly excepted.

Defendant thereupon requested the court to make the following additional finding of fact, viz: "Amend finding No. 5 by inserting after the words 'Coffin & Stanton,' in the first line of said finding, the words 'immediately after receiving said bonds, sold the same, and each and all thereof, but.'"

The court refused to make said additional finding of fact, to which ruling and action of the court defendant then and there duly excepted.

Defendant thereupon requested the court to make the following additional finding of fact, to be known as finding No. 16, viz:

"That the bonds and coupons mentioned and described in plaintiff's complaint, and each and all of them, were fraudulently taken by Walter Stanton from the custody of the city clerk of the city of Santa Cruz on or about the twenty-fourth day of April, 1894, and then and there, by him, the said Walter Stanton, appropriated to his own use."

The court refused to make said additional finding as requested by defendant, to which ruling and action of the court defendant then and there duly excepted.

Defendant thereupon requested the court to make the following additional finding of fact, to be known as finding No. 17, viz:

"That each and all of said bonds and coupons mentioned and set forth in plaintiff's complaint were, on or about the twenty-
474 fourth day of April, 1894, willfully, unlawfully and feloniously stolen, taken and carried away from the possession of the clerk of said city of Santa Cruz by Walter Stanton, a member of the said firm of Coffin & Stanton."

The court refused to make said additional finding as requested by defendant, to which ruling and action of the court defendant then and there duly excepted.

Defendant thereupon requested the court to make the following additional finding, to be known as finding No. 18, viz:

"That all purchasers and holders of the bonds and coupons mentioned and set forth in plaintiff's complaint had full notice and knowledge at the time of purchasing the same that said bonds and coupons, and each and all of them, constituted part of an indebtedness sought to be contracted by the city of Santa Cruz over and above and in excess of fifteen per cent. upon the assessed value of all taxable, real and personal property in said city of Santa Cruz, at the time of the issuance of such bonds."

The court refused to make the said additional finding as requested by the defendant; to which ruling and action of the court defendant then and there duly excepted.

Defendant thereupon requested the court to make the following additional finding of fact, to be known as finding No. 19:

"That the four hundred and fifty bonds of the denomination of $500 each, dated January 15, 1889, bearing interest at the rate of five per cent. per annum, issued by said city of Santa Cruz for the purchase and construction of the city water works, for
475 the refunding of which, to the extent of $225,000 the refunding bonds mentioned and described in plaintiff's complaint were in part issued, were, and each of them was, issued, sold and delivered by the city of Santa Cruz after the act of the legislature of the State of California *and* authorizing their execution, issuance, sale and delivery had been repealed; namely, after the nineteenth day of March, 1889."

The court refused to make the said additional finding, as requested by defendant; to which ruling and action of the court defendant then and there duly excepted.

The court thereupon, at the suggestion of plaintiff, and against the objection of defendant, made the following additional finding of fact, as an amendment to finding No. 12 of the original findings of fact filed in the cause, viz:

Prior to the purchase of the bonds by E. G. & E. Wallace, Messrs. F. H. Prince & Co. submitted to them a copy of the following opinion of Z. N. Goldsby, the city attorney of the defendant, practicing law in the city of Santa Cruz, California, namely:

"SANTA CRUZ, CAL., *April* 25, 1894.

I hereby certify that I have carefully examined all the steps taken and proceedings had relative to the issuance of $360,000 in five per cent. refunding bonds by the city of Santa Cruz, in the

State of California, and the bonds issued pursuant thereto, dated April 16, 1894, and find said proceedings regular, and said bonds legally issued and a valid and binding obligation of said city of Santa Cruz.

Z. N. GOLDSBY."

And, also, submitted a copy of the following opinion of L. B. Gleason, an attorney-at-law, practicing in the city of New York, namely:

476 "Messrs. Coffin & Stanton, 72 Broadway, New York city.

GENTLEMEN: I return herewith certified copies of the proceedings of the officials of the city of Santa Cruz, Cal., with reference to the issuance of refunding bonds of said city, bearing date April 16, 1894.

I have made a careful examination of these papers and of the constitution and statutes of the State of California, with reference to the issuance of refunding bonds by cities of said State. All the provisions of the constitution and the statutes of the State seem to have been most carefully and fully complied with, and from my examination I am of the opinion that these bonds are issued in pursuance of the laws relating thereto, and are legal and valid obligations of the said city of Santa Cruz.

Yours truly, LAFAYETTE B. GLEASON."

The copies of the opinion of Goldsby and of Gleason were furnished to F. H. Prince & Co. by Messrs. Coffin & Stanton. These opinions were not satisfactory to E. G. & E. Wallace, and they asked the opinion of some attorney practicing law in the city of Boston. F. H. Prince & Co. thereupon suggested that the opinion of M. F. Dickinson, Jr., an attorney practicing in that city, should be obtained; this suggestion was satisfactory to E. G. & E. Wallace, and it was then agreed between F. H. Prince & Co. and E. G. & E. Wallace that the opinion of said Dickinson upon the question of the validity of said bonds should be obtained by F. H. Prince & Co. F. H. Prince & Co. then, on their own account and for themselves, and not acting as agents of E. G. & E. Wallace, employed
477 said Dickinson to give his opinion in relation to the validity of such bonds, and as the result of such employment, and as the attorney of F. H. Prince & Co., Dickinson gave to F. H. Prince & Co. the following opinion, which was afterwards by F. H. Prince & Co. submitted to E. G. & E. Wallace, prior to their purchase of such bonds:

"BOSTON, *August* 29, 1894.

F. H. Prince & Co., 2 and 8 State street, Boston, Mass.

GENTLEMEN: I have examined the papers that you have submitted in regard to the $360,000, five per cent. refunding bonds of the city of Santa Cruz, Cal., dated April 16, 1894. In my opinion the bonds are legally issued in conformity to the laws of the State

of California and the ordinances of the city of Santa Cruz, and constitute a legal and valid obligation of said city.

Very respectfully yours, F. M. DICKINSON JR."

Said Dickinson had notice of all the matters recited in the ordinances of the defendant city, numbered 314, 315 and 320, but Dickinson did not communicate this knowledge of said ordinances, of any of the facts recited therein, to the said firm of E. G. & E. Wallace; and the said Dickinson, in the examination of said ordinances, and in giving said opinion, was not the agent or attorney of E. G. & E. Wallace, but acted solely as the attorney of F. H. Prince & Co.

To which ruling and action of the court making said additional finding, defendant then and there duly excepted.

478 Defendant excepted particularly to that portion of said last-mentioned additional finding which reads as follows: "F. H. Prince & Co. then, on their own account and for themselves, and not acting as agents of E. G. & E. Wallace, employed said Dickinson to give his opinion in relation to the validity of such bonds, and as the result of such employment, and as the attorney of F. H. Prince & Co., Dickinson gave to F. H. Prince & Co. the following opinion, which was afterwards by F. H. Prince & Co. submitted to E. G. & E. Wallace prior to their purchase of such bonds:" upon the ground that said portion of said finding is not supported by the evidence, nor by any evidence in the case and is contrary to all the evidence upon that subject in the case in this: that all of the evidence upon the subject of the employment of said Dickinson shows that he was employed by F. H. Prince & Co. as the agents of Messrs. E. G. & E. Wallace, not on account of nor for said F. H. Prince & Co., but on account of and for Messrs. E. G. & E. Wallace, the purchasers of said bonds.

Defendant also excepted particularly to that portion of said last-mentioned additional finding which reads as follows: "The said Dickinson, in the examination of said ordinances and in giving said opinion, was not the agent or attorney of E. G. & E. Wallace, but acted solely as the attorney of F. H. Prince & Co.;" upon the ground that said portion of said finding is not supported by the evidence, nor by any evidence in the case, and is contrary to all the evidence in the case in this: that all the evidence upon the subject of the employment of said Dickinson, and upon the subject of his advice and opinion concerning the validity of said bonds, shows that

479 he was the agent and attorney of E. G. & E. Wallace, and did not act solely or at all as the attorney of F. H. Prince & Co.

Defendant duly excepted to that portion of finding numbered eight of the original findings filed herein on September 29, 1898, which is in the words and figures following: "On the 26th day of March, 1894, ordinance No. 320 was duly enacted by the mayor and common council of the defendant," upon the ground that said portion of said finding is not supported by the evidence, nor by any evidence in the case, and is contrary to all the evidence in the case in this: That it appears from the evidence that said ordinance was not duly enacted, because it appears from the evidence that there

had been no election upon the question of refunding the bonded indebtedness of defendant prior to the twenty-sixth day of March, 1894; that the bond issue sought to be provided for in said ordinance was not authorized by any vote or action of the people of the city of Santa Cruz prior to the date of the alleged adoption of said ordinance, and that the evidence shows that said alleged ordinance was not enacted by the mayor and common council of the defendant, but was enacted by one William T. Jeter, pretending to act as mayor in place of Robert Effey, the duly elected and qualified mayor of defendant, and by other persons claiming and pretending to act as the common council of the defendant, but who were not at that time members of the common council of the defendant.

Defendant duly excepted to that portion of finding of fact numbered twelve of the original findings of fact filed herein, which is in the words and figures following: "All of the assignors of
480 plaintiff other than the one referred to in finding No. 3 and E. G. & E. Wallace, who purchased certain of the refunding bonds and coupons issued under the circumstances hereinafter set forth in this finding, were *bona fide* purchasers of the bonds and coupons assigned by them to plaintiff, and sued on in this action, and were without notice of any fact tending to impeach the truth of the recitals in said bonds," upon the ground that said finding of fact is not supported by the evidence, nor by any evidence in the case, and is contrary to all of the evidence upon that subject in the case.

Defendant duly excepted to all of that portion of finding of fact numbered twelve of the original findings of fact filed herein, which is in the words and figures following, to wit: "Therefore, knowledge of F. H. Prince & Co., concerning the illegality of said bonds, as shown by ordinances numbered 314, 315, and 320, was not constructive notice thereof to E. G. & E. Wallace," upon the ground that said finding is not supported by the evidence, nor by any evidence in the case, and is contrary to all of the evidence upon that subject in the case.

Defendant duly excepted to that portion of finding of fact numbered twelve of the original findings of fact filed herein, which is in the words and figures following to wit: "Nor did E. G. & E. Wallace have any actual knowledge or actual notice of said matters, nor of any fact tending to impeach the truth of the recitals contained in the bonds;" upon the ground that said finding is not supported by the evidence, nor by any evidence in the case, and is contrary to all of the evidence upon that subject in the case.

Defendant duly excepted to conclusion of law No. 1, namely,
481 "That Jeter was *de facto* mayor from April 16, to May 7, 1894, and the old council were *de facto* members of the common council between said dates;" upon the ground that said conclusion of law is erroneous, and is not supported by the evidence nor by the findings of fact herein.

Defendant duly excepted to conclusion of law No. 2, namely, "That E. G. & E. Wallace were *bona fide* purchasers of bonds assigned by them to plaintiff," upon the ground that said conclusion

of law is erroneous, and is not supported by the evidence, nor by the findings of fact herein.

Defendant duly excepted to conclusion of law No. 3, in findings of fact filed herein, which reads as follows: "That plaintiff is not entitled to recover upon the three coupons assigned by him by Northern Counties Investment Tr. Co., but is entitled to recover on all other bonds and coupons assigned him, with interest and costs of suit," upon the ground that that portion of said conclusion of law No. 3 which declares that the plaintiff is entitled to recover on all other bonds and coupons assigned to him, with interest and costs of suit is erroneous and contrary to the evidence, and contrary to the findings of fact herein, and is not supported by the evidence nor by the findings of fact herein.

Wherefore, plaintiff in error (defendant herein) prays that the judgment of the circuit court of the United States in and for the ninth circuit, northern district of California, be reversed, and that said circuit court be directed to grant a new trial herein.

482 The above is presented as the bill of exceptions on behalf of the defendant.

Dated December 5, 1898.

LINDSAY & CASSIN AND
JAMES G. MAGUIRE,
Attorneys for Defendant.

The foregoing is hereby allowed, settled and approved, as defendant's bill of exceptions in the above-entitled action. The exceptions therein noted were taken in all respects as provided by law, and the rules of this court. The time for presenting and filing the foregoing bill of exceptions was duly extended and continued by the written stipulation of plaintiff's attorneys to the present day.

Dated December 6, 1898.

JOHN J. DE HAVEN, *Judge.*

Service by copy of the foregoing bill of exceptions is hereby admitted this fifth day of December, 1898, within the time granted and allowed by our written stipulations.

Dated December 5, 1898.

CHICKERING, THOMAS & GREGORY,
Attorneys for Plaintiff.

Time for presentation of amendments to the foregoing bill of exceptions is hereby waived and said bill of exceptions may be presented to the judge of the circuit court who tried said cause, for allowance and settlement this sixth day of December, 1898.

CHICKERING, THOMAS & GREGORY,
Attorneys for Plaintiff.

(Endorsed:) Filed December 6, 1898. Southard Hoffman, clerk.

483 In the Circuit Court of the United States in and for the Ninth Circuit, Northern District of California.

ALBERT H. WAITE, Plaintiff,
vs.
THE CITY OF SANTA CRUZ (a Corporation), Defendant.

Petition for Writ of Error.

The City of Santa Cruz, defendant in the above-entitled cause, feeling aggrieved by the decision of the court and the judgment entered in said cause on the twenty-ninth day of September, 1898, in pursuance of said decision, whereby it was ordered, adjudged and decreed that plaintiff herein have and recover from the defendant the sum of $22,950, with interest thereon from April 15, 1895, with the costs incurred by said plaintiff in this action, now comes, by Lindsay & Cassin, James G. Maguire and John Garber, its attorneys, and petitions said court for an order allowing said defendant to prosecute a writ of error to the honorable the United States circuit court of appeals for the ninth circuit under and according to the laws of the United States in that behalf made and approved, and also that an order be made fixing the amount of security for costs which defendant shall give and furnish upon said writ of error.

484 Wherefore, petitioner prays that it be allowed to prosecute a writ of error to said the honorable the United States circuit court of appeals for the ninth circuit.

Dated December 28, 1898.

LINDSAY & CASSIN,
JAMES G. MAGUIRE,
JOHN GARBER,
Attorneys for Defendant.

United States Circuit Court of Appeals in and for the Ninth Circuit, Northern District of California.

THE CITY OF SANTA CRUZ (a Corporation), Plaintiff in Error,
vs.
ALBERT H. WAITE, Defendant in Error.

Assignments of Error.

Now comes The City of Santa Cruz, the plaintiff in error herein, by Lindsay & Cassin, James G. Maguire, and John Garber, Esqs., its attorneys, and particularly specifies the following as errors upon which it will rely and which it will urge in its writ of error in the above-entitled cause:

1.

That the circuit court of the United States, in and for the ninth circuit, northern district of California, erred in overruling de-
485 fendant's demurrer to the amended complaint of plaintiff in this action for the following reasons, to wit:

(*a.*) Because it appears upon the face of said amended complaint that plaintiff (defendant in error) has mistaken his remedy, for the reason that the bonds sued upon in this action, and the interest thereon, were to be paid only out of a special fund to be created for that purpose, in the manner and form prescribed by the statute and under and by virtue of which the refunding bonds are alleged to have been issued, and in accordance with the provision "for the collection of an annual tax sufficient to pay the interest on the same (the bonds) as it falls due, and also the provision to constitute a sinking fund for the payment of the principal thereof as it should fall due," alleged to have been made by the defendant in accordance with the terms of said bonds, and of the law under which they were issued, before the delivery of said bonds and coupons as alleged in the amended complaint, and there is no allegation, either that the special tax prescribed by law was or was not levied, and there is no allegation either that there is money in said special fund applicable to the payment of either the principal or the interest of said bonds, or any of them, nor that there is no money in such special fund. It appears upon the face of said amended complaint that plaintiff (defendant in error) is limited to the special fund provided by law and by the ordinance of the defendant for the payment of his bonds and coupons, and that he has no right to enforce the payment of either the bonds or coupons, or any of them, out of the general assets of the city of Santa Cruz.

486 (*b.*) Because the act of the legislature of the State of California entitled "An act to amend an act entitled 'An act authorizing the common council, board of trustees, or other governing body of any incorporated city or town, other than cities of the first class, to refund its indebtedness, issue bonds therefore, and to provide for the payment of the same (approved March 15, 1893),' approved March 1, 1893," by authority of which, and under the terms of which, it is alleged in said amended complaint that the bonds sued upon in this action were issued, is in conflict with the constitution of the State of California, in that said act is a local and special law relating to a subject concerning which the constitution of the State of California requires all laws to be general.

(*c.*) Because it appears upon the face of said amended complaint that the bond issued in question was illegally made, because in excess of the amount of bonded indebtedness which the city of Santa Cruz could contract under the laws of the State of California in force at the time when said bonds were issued.

(*d.*) Because the said refunding act under which said bonds are alleged to have been issued did not authorize the issuance of any bonds by the city of Santa Cruz, for the reason that, while the act in question gives power to the governing body of any city within the classes selected to submit to the qualified electors thereof, at an election to be held for that purpose, the question of refunding its outstanding indebtedness, evidenced by bonds and warrants thereof, and specifies the manner in which said election shall be

487 called and held and the form of notice to be given of such election, there is no provision in the act, or in any other act

or law of the State of California, as to what shall be the result of a vote favorable to refunding at such election, and that said refunding act does not say, either in terms or in substance, that if the vote at such election be favorable to refunding, the city or its governing body, or its executive head or any other officer or agent, shall have power to make or issue refunding bonds.

(*e.*) Because it appears upon the face of said amended complaint that neither the bonds nor the coupons were executed or signed by the city of Santa Cruz.

(*f.*) Because it appears upon the face of said amended complaint that the said refunding act under which said bonds are alleged to have been issued is unconstitutional, as violative of the provision of the Constitution of the United States which forbids any State to pass any law impairing the obligation of a contract.

(*g.*) Because said amended complaint does not show that the bonds sued upon were sold by the city of Santa Cruz for their face value in gold coin as required by said refunding act of 1893.

(*h.*) Because it appears upon the face of said amended complaint that the bonds sued upon, by the terms thereof, are payable in gold coin of the United States, violative of the provision of said refunding act of 1893 under which said bonds were issued, which requires that bonds issued under the terms and authority thereof shall be payable in gold coin or lawful money of the United States.

488 (*i.*) Because said complaint does not state facts sufficient to constitute a cause of action.

(*j.*) Because there is no allegation in said complaint that the plaintiff was a *bona fide* purchaser, nor that the plaintiff paid any consideration for the bonds or coupons purchased, nor are any facts alleged showing that at the time of any purchase by the plaintiff he had not notice of the invalidity of said bonds and coupons, nor that he had not notice of facts sufficient to put him upon inquiry as to such invalidity.

(*k.*) Because it appears on the face of said complaint that the plaintiff was not a *bona fide* purchaser without notice, in that it is alleged in the complaint that the notice of election therein mentioned was required by the statute of 1893 to, and did, specify the particulars of the indebtedness to be refunded, and that the plaintiff had notice of, and was bound to take notice of, all the terms and conditions of said statute, and, therefore, had notice to put him upon inquiry as to the invalidity of said bonds, as being an attempt to refund what was not such an indebtedness as was allowed by the statute to be refunded; and such inquiry, if reasonably pursued, would have fully informed plaintiff of the invalidity of said proceedings, the same appearing by matter of record provided for by the statute, to wit: the specification aforesaid required to be inserted in said notice of election.

(*l.*) Because it appears on the face of said amended complaint that plaintiff could not rely upon the recitals in said bonds as concluding the questions of the invalidity thereof or as estopping

489 the city from alleging to the contrary in said recitals, and that the matters and facts constituting the invalidity of said

bonds were not by any law committed to the decision of the officials of said city, and the question as to whether the indebtedness attempted to be refunded was such an indebtedness as could be so refunded under the said statute of 1893 was not one committed to the decision of the officials of the city of Santa Cruz or which could be concluded by any recitals by them made, but was to be determined by an inspection of the record evidence thereof provided for by the statute, and because the said city officials had no power finally or conclusively to determine the question whether the indebtedness *proposes* to be refunded *was such* an indebtedness as could be refunded under the said statute.

2.

Error of said court in overruling defendant's objection to the question asked the witness Robert Effey, on the grounds that said question was irrelevant, immaterial and incompetent. Said question and answer thereto are as follows:

"Q. Mr. Effey, did you assume the duties of the office of mayor on April 16, 1894? A. No, sir."

It appeared from the testimony of said witness (p. —) that at a charter election held in the city of Santa Cruz on the ninth day of April, 1894, he was elected mayor of said city of Santa Cruz, and that he qualified as such mayor by taking the oath of office on the sixteenth day of April, 1894, between the hours of 11 o'clock a. m. and 2 o'clock p. m., thereby and at that time becoming the *de jure* and *de facto* mayor of the city of Santa Cruz.

490 The said question asked the witness Effey was for the purpose of proving that some one else, and not Effey, was mayor of the city of Santa Cruz on the sixteenth of April, 1894, after the qualification of Effey; and said question was immaterial, irrelevant and incompetent, and the admission of the answer thereto prejudicial to the defendant.

3.

Error of said court in overruling the defendant's objection to the question asked the witness O. J. Lincoln, upon the grounds that the same was irrelevant, immaterial and incompetent. Said question and the answer thereto are as follows:

"Q. Mr. Lincoln, who performed the duties of the office of mayor of the city of Santa Cruz between April 16, 1894, and May 7, 1894? A. Mr. Jeter."

It has been established by the testimony of Robert Effey and by documentary evidence (p. —), that the said Robert Effey, on the sixteenth day of April, 1894, was the duly elected and qualified mayor of the city of Santa Cruz for the term of two years following April 16, 1894. The said question asked the witness Lincoln was for the purpose of proving that some one else, and not Mr. Effey, was mayor of the city of Santa Cruz between April 16, 1894, and May 7, 1894; and said question was immaterial, irrelevant and incompetent, and the admission of the answer thereto prejudicial to the defendant.

4.

Error of said court in admitting in evidence a resolution
491 incorporated in a purported record of a meeting of the city council of the city of Santa Cruz, held on the twenty-third day of April, 1894, ordering and directing that the bonds here in question be delivered to Messrs. Coffin & Stanton, the minutes of said meeting showing that William T. Jeter acted as mayor, and members of the old city council, whose successors were elected on the ninth day of April, 1894, and qualified between said ninth day of April and the sixteenth day of April, 1894 (p. —) acted as members of the city council (p. —).

Defendant objected to said resolution as irrelevant, immaterial and incompetent, and now specifies, in support of said objection, that the resolution appeared from the face of the minutes to have been adopted by persons who were not legally entitled to the offices the functions of which they exercised at the time. The court overruled the objection; to which ruling defendant then and there duly excepted. The resolution was thereupon admitted in evidence (p. —) to the prejudice of defendant.

5.

Error of said court in overruling the objection of defendant to a question asked the witness, William T. Jeter, on the grounds that the same was immaterial, irrelevant and incompetent. Said question and the answer thereto are as follows:

"Q. Mr. Jeter, who performed the duties of the office of mayor of Santa Cruz from April 16 to May 7, 1894? A. I acted as mayor until the evening of the seventh of May as well as I recollect" (p. —).

It had been established by the testimony of Robert Effey
492 and by documentary evidence as hereinabove in these assignments of error stated, that on the sixteenth day of April, 1894, Robert Effey was the duly elected and qualified mayor of the city of Santa Cruz for the then ensuing term of two years; and the said question asked the witness Jeter was for the purpose of showing that he (Jeter) was mayor of the city of Santa Cruz from April sixteenth to May seventh, 1894; and said question was immaterial, irrelevant, and incompetent, and the admission of the answer thereto prejudicial to the defendant.

6.

Error of said court in overruling defendant's objection to the question asked the witness, William T. Jeter, on the grounds that the same was irrelevant, immaterial and incompetent. The said question and the answer thereto are as follows:

"Q. I want to ask you, Mr. Jeter, if Mr. Robert Effey, the mayor-elect, attempted in any way to your knowledge to perform the duties of mayor of Santa Cruz prior to May 7, 1894? A. Not to my knowledge."

It had been established, as hereinbefore stated, that Robert Effey was the mayor of the city of Santa Cruz from April 16, 1894, to May

7, 1894; and the said question asked the witness Jeter was for the purpose of showing that the (Jeter) and not Effey, was mayor of the city of Santa Cruz between said dates; and said question was immaterial, irrelevant and incompetent, and the admission of the answer thereto prejudicial to the defendant.

7.

Error of said court in overruling defendant's objection to
493 the question asked the witness, William J. Jeter, on the grounds that the same was irrelevant, immaterial and incompetent. The said question and the answer thereto are as follows:

"Q. Between the sixteenth of April and the seventh of May, did any person question your right to act as mayor of the city of Santa Cruz? A. Not that I have any knowledge of."

It had been established, as hereinbefore stated, that Robert Effey was mayor of the city of Santa Cruz from the sixteenth day of April to the seventh day of May, 1894; and the said question was asked for the purpose of showing that William T. Jeter, and not Robert Effey, was mayor of said city between said dates; and said question was immaterial, irrelevant and incompetent, and the admission of the answer thereto prejudicial to the defendant.

8.

Error of said court in overruling defendant's objection to the question asked the witness Charles E. Williams on recross-examination, on the ground that said question was immaterial and not cross-examination. The said question and the answer thereto are as follows:

"Q. Do you know what there is standing to the credit of that fund today? A. There is standing to the credit of said mortgage-bond fund $14,100 and some odd dollars" (p. —).

It had been established by evidence that the bonds sued upon herein were issued in part for the purpose of refunding the mortgage bonds of a private corporation, to wit: the City Water
494 Company of Santa Cruz, and therefore in violation of the provisions of the refunding act of 1893, under which the said bonds sued upon herein are alleged to have been issued (pp. —).

The witness Charles E. Williams testified in his direct examination on behalf of the defendant that he was city treasurer and tax collector of the city of Santa Cruz, and had held that office since 1892 continuously; that the city of Santa Cruz had never received any payment for the refunding bonds alleged to have been executed by the defendant, and that no money had ever at any time come into his possession, as treasurer or otherwise, in the payment of any of those bonds; and had furthermore testified, on redirect examination, as to the amount of the bonded indebtedness of the city of Santa Cruz evidenced by bonds and warrants of said city on the thirteenth of March, 1894, and that said mortgage bonds of said private corporation were not part of the bonded indebtedness of the city of Santa Cruz (pp. —).

On recross-examination the witness testified that his books contain entries with regard to the payment of interest on said mortgage bonds of said private corporation; that on one occasion, in 1893, interest on said mortgage bonds was forwarded to the Holland Trust Company for payment, and an account of such disbursement appeared in witness's books as treasurer; that the city council created what was called a "mortgage-bond fund" in 1892 or 1893, and that certain receipts derived from the water works were carried to the credit of this fund; and that, against this fund, was charged the payment of the fund transmitted to the Holland Trust Company in 1893 in payment of interest on said mortgage bonds; that
495 witness, as treasurer, was still crediting to said mortgage-bond fund a certain proportion of the receipts from the water works.

The witness further stated on recross-examination that he had not that account with him, and that no interest on said mortgage bonds had been paid since the first payment in 1893.

The said question objected to was then asked; and said question was immaterial and not cross-examination, and the admission of the answer thereto prejudicial to the defendant.

9.

Error of said court in overruling the defendant's objection to the question asked the witness O. J. Lincoln, as follows:

"Q. Mr. Lincoln, will you kindly examine the minutes of the proceedings of the common council under dates of April 24, April 25, April 30, May 3, May 5, and the first of the two meetings of May 7, 1894, in which you have stated that on roll-call all were present. Can you now state from your memory, and refreshing the same from those entries, whether William T. Jeter, the mayor of the municipality, was present at those meetings?" (p. —.)

The defendant objected to this question as immaterial, irrelevant and incompetent, and not tending to show that William T. Jeter, was a *de facto* officer of the municipality, the city of Santa Cruz, on the afternoon of the sixteenth of April, 1894. The court overruled the objection; to which ruling of the court the defendant then and there duly excepted; and the witness answered that William T. Jeter was present at such meetings.

496 It had been established by the evidence, as above in these specifications of error stated, that Robert Effey was the duly elected and qualified mayor of the city of Santa Cruz from and after the sixteenth of April, 1894; and it had been further established by the evidence of William T. Jeter that a large portion of the said refunding bonds alleged herein to have been executed by the defendant were signed by him (Jeter) on the afternoon of April 16, 1894, after the hour of 3 o'clock and after the qualification of Robert Effey as mayor of the city of Santa Cruz, and after the expiration of the term of office of said William T. Jeter as mayor of the city of Santa Cruz; that such signing of said bonds was done in the private office of the witness Jeter, and privately, and not in the presence of any person or persons whatever (pp. —).

The said question asked the witness Lincoln and objected to did not tend to show that William T. Jeter was *de facto* mayor of the city of Santa Cruz on the afternoon of the sixteenth of April, 1894, when said bonds were signed by him; and said question was immaterial, irrelevant, and incompetent, and the admission of the answer thereto prejudicial to the defendant.

10.

Error of said court in overruling defendant's objection to the question asked the witness Walter Stanton, on the grounds that the same was irrelevant, immaterial, and had nothing to do with the case. The said question and the answer thereto are as follows:

"Q. Do you recollect any arrangement by which you were
497 to pay Prince, as a commission for placing the Ironwood bonds, half of the profits of the interest money on those bonds? A. There must be some paper in existence showing the exact relation of Coffin & Stanton and F. H. Prince & Co. in this matter. This transaction was carried on some four years ago and at a very anxious and worried time for the firm of which I was a member. And as to my recollection of these various bonds which you refer to, it is very difficult for me to form an absolute recollection of any one bond, excepting just the best I can by groping at it. On my direct examination I stated the best that I could remember. Now, when you call for these different bonds, it is absolutely impossible for me to remember" (pp. —).

11.

Error of said court in overruling defendant's objection to the question asked the witness Walter Stanton, on the grounds that the same was irrelevant and incompetent. The said question and the answer thereto are as follows:

"Q. I ask you whether you recall receiving a letter from F. H. Prince & Co. as follows: 'September 22, 1894. Coffin & Stanton, 72 Broadway, New York. You agreed with us last night that we should divide the interest on Ironwood bonds, and you must stand by it. F. H. Prince & Company.' A. I have no recollection. I was away from the city at the time that letter was sent" (pp. —).

12.

Error of said court in overruling defendant's objection to the question asked the witness Walter Stanton, on the ground
498 that the same was incompetent. The said question and the answer thereto are as follows:

"Q. Have you any doubt, from the examination of letter signed by your partner, 'Plaintiff's Exhibit 1 of this date,' that the transaction was closed at that date, September 22 or 23; should you not say that the contract was closed on that day? A. Yes" (pp. —).

13.

Error of said court in admitting in evidence the letter of September 22, 1894, from F. H. Prince & Co. to Coffin & Stanton, against

the defendant's objection, upon the grounds that said letter was inadmissible, irrelevant, immaterial and incompetent. The following is a copy of said letter:

"SEPTEMBER 22, 1894.

Coffin & Stanton, 72 Broadway, New York:

You agreed with us last night that we should divide the interest on Ironwood bonds, and you must stand by it.

F. H. PRINCE & COMPANY."

(pp. —.)

14.

Error of said court in denying defendant's motion to strike from the answer of the witness Frederick H. Prince, to a question asked him, the words in brackets in the following answer. Said question and the answer thereto are as follows:

"Q. Now what is it you wish to have understood as to your answer: that you did not inform the Messrs. Wallace that you received an opinion from Story & Thorndyke, or merely that you did not inform them that they had given you an opinion that the
499 bonds were illegal? A. I want to have it understood that I do not remember to have informed Messrs. E. G. & E. Wallace that I had an opinion from Messrs. Story & Thorndyke, and also that I distinctly remember that I did not inform them that Story & Thorndyke had given me an opinion that the bonds were illegal, [because they did not do so."] (pp. —.)

Said motion was made upon the ground that the said words "because they did not do so" were not responsive to the question.

15.

Error of said court in sustaining plaintiff's objection to the question asked the witness William H. Fleming, on the ground that the same was immaterial, the said question being as follows:

"Q. Does the entry correspond with the testimony given by Mr. Prince?" (p. —.)

It had been established that 150 of the alleged refunding bonds, purported to have been executed by the defendant, The City of Santa Cruz, and the subject of this action, had been assigned to the plaintiff herein without consideration and for collection only by Messrs. E. G. & E. Wallace (p. —). It had been further established that said 150 bonds were sold to Messrs. E. G. & E. Wallace by Messrs. Coffin & Stanton, through the medium of F. H. Prince & Co., and that, at the time of the sale of said bonds, F. H. Prince & Co. had full knowledge of all proceedings had in the matter of the issuance of said refunding bonds by the city of Santa Cruz, including knowledge of all ordinances passed by the mayor and
500 common council of the city of Santa Cruz with reference to the issuance of said bonds (pp. —).

The defendant contended, and still contends, that in the sale of said 150 refunding bonds to Messrs. E. G. & E. Wallace by Coffin & Stanton, F. H. Prince & Co. acted as and were the agents of E. G. & E. Wallace, and that, therefore, through the knowledge of their

agent, Messrs. E. G. & E. Wallace, had notice and knowledge of the illegality of said refunding bond issue.

Frederick H. Prince had testified, to the surprise of defendant, that, in such transaction, F. H. Prince & Co. were acting as the agents of Coffin & Stanton (p. —).

The witness Fleming testified that he was a clerk for F. H. Prince & Co., and had been with them in that capacity twelve years; that he remembered the transaction between F. H. Prince & Co. and Coffin & Stanton, and Messrs. E. G. & E. Wallace in the year 1894 concerning the sale of the Santa Cruz refunding bonds to Messrs. E. G. & E. Wallace and that he had found an entry on the books of F. H. Prince & Co. relating to said transaction (p. —).

That said question objected to by plaintiff was then asked, and the sustaining of said objection on the ground that the same was immaterial was error and prejudicial to the defendant.

16.

Error of said court in sustaining plaintiff's objection to the question asked the witness William H. Fleming, on the ground that the same was immaterial; the said question being as follows:

501 "Q. Will you please turn to the page of that book containing the entry and read the entries."

The entry referred to on page — of the record is as follows:

"Page 952, Stock Ledger No. 4.

E. G. & E. Wallace.

1894.			
Sept. 22.	8 per cent. Page Belting Co. rec'd.		
25.	150,000 Santa Cruz 5's, 100		150,000
	Int. at 5 162 days.		3,375
	Comm. F. H. P. & Co. as ag'ts		2,500
			155,875
1894.			
Sept. 25.	435 Page Belting Co., 85		36,975
	Demand loan		100,000
	C'k		18,900
			155,875"

and tended to prove that in said transaction of the sale of said refunding bonds to Messrs. E. G. & E. Wallace by Coffin & Stanton, F. H. Prince & Company were acting solely as the agents of E. G. & E. Wallace, and not as the agents of Coffin & Stanton, and the sustaining of plaintiff's objection thereto was error and prejudicial to the defendant.

17.

Error of said court in sustaining plaintiff's objection to the question asked the witness William E. Fleming, on the ground that the same was immaterial, the said question being as follows:

502 "Q. Mr. Fleming, what does the word 'rec'd' on the first line mean? 'Received?'" (pp. —.)

18.

Error of said court in sustaining plaintiff's objection to the question asked the witness Fleming, on the ground that the same was immaterial, the said question being as follows:

"Q. What does the figure '5' and the letter 's' after 'Santa Cruz' mean?" (pp. —.)

19.

Error of said court in sustaining plaintiff's objection to the question asked the witness Fleming, on the ground that the same was immaterial, the said question being as follows:

"Q. What does '5's' mean?" (pp. —.)

20.

Error of said court in sustaining plaintiff's objection to the question asked the witness Fleming, on the ground that the same was immaterial, the said question being as follows:

"Q. The words 'int. at 5 162 days,' on the third line—what do they mean?" (pp. —.)

21.

Error of said court in sustaining plaintiff's objection to the question asked the witness Fleming, on the ground that the same was immaterial, the said question being as follows:

"Q. The words 'comm. F. H. P. & Co. as ag'ts'—what
503 does the word 'comm.' mean? 'Commission?'" (p. —.)

22.

Error of said court in sustaining plaintiff's objection to the question asked the witness Fleming, on the ground that the same was immaterial; the said question being as follows:

"Q. And 'F. H. P. & Co.' means 'F. H. Prince & Company?'" (pp. —.)

23.

Error of said court in refusing to make the following additional finding of fact requested by defendant: "Amend finding No. 12 by inserting after the words 'E. G. & E. Wallace,' in line 27 on page 10, the following: 'Before purchasing said bonds, said firm of E. G. & E. Wallace asked for the opinion of some attorney in Boston known to the firm, upon the question of the validity of the bonds, and, after consultation, it was decided to refer the question to Mr. M. F. Dickinson, Jr., an attorney of the city of Boston. Prince & Co. thereupon employed and consulted said Dickinson in regard to the validity of the bonds in question, and submitted to him copies of said ordinances numbered 314, 315, and 320 of the city of Santa Cruz; after examining which said Dickinson rendered a written opinion in favor of the validity of the bonds, which opinion was

furnished to and received by said firm of E. G. & E. Wallace prior to their purchase of the bonds in question. But said Dickinson did not communicate his knowledge of said ordinances, or any of them, to said E. G. & E. Wallace." As the line and page of the
504 original finding hereinabove specified do not correspond in the record with the line and page of the original findings of fact on file, plaintiff in error states more specifically that the point in said finding No. 12 at which the amendment requested as above stated was to be inserted was after the following words in said finding: "That said F. H. Prince & Co. did not communicate their said knowledge to E. G. & E. Wallace."

The court erred in refusing to make said additional finding for the reasons that the same was in strict accordance with and fully supported by all the evidence and testimony on that subject, and there was no evidence or testimony to the contrary, and the said additional finding was required by the uncontradicted and undisputed evidence, to wit: the evidence of Summer Wallace and the evidence of Frederick H. Prince, as follows:

Summer Wallace testified as follows (pp. — of the record): "I think F. H. Prince & Co. made no statement to me in regard to the financial condition of the city or in regard to the validity of the bonds. They submitted the opinion of Mr. Goldsby, of Santa Cruz, Cal., and Mr. Gleason of New York. This was not satisfactory to us and we asked for the opinion of some attorney in Boston and decided to refer it to Mr. M. F. Dickinson, Jr., attorney for the American Loan & Trust Co., and his opinion was obtained, which I have here. Those opinions being favorable I purchased the bonds. I have the opinions of the attorneys upon which we relied in making the purchase. * * * I never saw Mr. Dickinson. Mr. Prince brought his opinion to us. All those opinions were procured
505 by Prince & Co. or by Coffin & Stanton. The Goldsby and Gleason opinions were submitted to us without consultation with us, but the Dickinson opinion was obtained after, by agreement, *after* I had said to Prince & Company that I wanted an opinion from Dickinson."

Frederick H. Prince testified (pp. — of the record): "I suggested to Messrs. Wallace that they buy the Santa Cruz bonds, and they authorized me to buy them. I stated to them that Coffin & Stanton in New York, I thought, were hard up for money, it being then in the middle of one of our panics, and I thought by advancing this amount of money he could get them to buy this manufacturing stock in exchange. Messrs. E. G. & E. Wallace had spoken to me previously about selling that Page Belting stock, before I broached this purchase of the Santa Cruz bonds, and they had told me I could sell the belting stock if I could. * * * I don't know whether the Messrs. Wallace made any inquiry as to the legality or validity of the Santa Cruz bonds. We employed attorneys to make investigation and to give an opinion as to the legality of the bonds. We employed Mr. M. F. Dickinson. Story & Thorndyke were our private counsel, and they were called upon by us to investigate into the legality of these bonds and to give an opinion.

During the long negotiations between July and September the Messrs. Wallace asked whether we had called upon any attorneys for their opinion as to the legality of these bonds. It is always customary in a sale of bonds to give a lawyer's opinion that the bonds have been properly examined, and in this case, I think there were three opinions. Messrs. Wallace asked us what opinion we had in regard to the bonds being properly issued, and we
506 gave them Mr. Dickinson's opinion, and also the opinion of some lawyer in New York, whose name I do not recollect, and also the lawyer out in California. Coffin & Stanton sent us all the papers relating to the issue of these Santa Cruz refunding bonds, and we submitted them to Mr. Dickinson, whom we consulted before we consulted Story & Thorndyke. * * * In this case, as I remember it, there was a very full set of papers, votes and so forth. I could not swear positively, but it is my impression that all the ordinances of the city of Santa Cruz, the advertisements, and the contract with Coffin & Stanton, were submitted. They were very careful to send all papers. That is my best memory. * * * It is customary in selling bonds to give a Boston lawyer's opinion in reference to the same. The opinion of the California lawyer and the New York lawyer were sent to me with the papers by Coffin & Stanton. I think Dickinson gave us his opinion, and then we called on Story & Thorndyke, our private lawyers, for their opinion. After we originally got papers from Coffin & Stanton in connection with these Santa Cruz bonds, Dickinson asked for certain papers, which were sent for to Coffin & Stanton and they sent them to us. That was subsequent to the first papers sent us and before Dickinson gave his opinion. As I remember it he asked for some papers, that we sent for them, and they were given to him. Coffin & Stanton supplied us with all the necessary sworn statements of all kinds and descriptions * * *."

The said witness, Frederick H. Prince, further testified (pp. — of the record), that the firm of Frederick H. Prince & Co.
507 had sent the following letter to Messrs. E. G. & E. Wallace before the purchase by said Messrs. E. G. & E. Wallace of the bonds in question:

"BOSTON, *August* 31, 1894.

Messrs. E. G. & E. Wallace, Rochester, N. H.

GENTLEMEN: As instructed by you, we have negotiated with Messrs. Coffin & Stanton to sell to you the $360,000 City of Santa Cruz, Cal., 5 per cent. bonds, dated April 16, 1894, at par and interest, they agreeing to accept, in payment therefor, 350 shares of Page Belting Co. preferred stock at par; 520 shares of Page Belting Co. common stock at 85, and the balance in cash. The legality of this issue of bonds has been passed upon by Mr. M. F. Dickinson, Jr., of the law firm of Messrs. Hyde, Dickinson & Howe, the attorneys of the American Loan and Trust Co., and we enclose herewith his written opinion, which kindly return to us for our files. Please notify us when it will be agreeable to you to carry through the

transaction. Our charge to you for services in this matter will be $2,500, as already arranged with Mr. Summer Wallace.

Very truly yours, F. H. PRINCE & CO."

24.

Error of said court in refusing to make the following additional finding of fact requested by said defendant: "Amend finding No. 5 by inserting, after the words 'Coffin & Stanton' in the first line of said finding, the words 'immediately after receiving said bonds, sold the same, and each and all thereof, but.'"

The court erred in refusing to make said additional find-
508 ing of fact because the uncontradicted evidence shows that Coffin & Stanton, immediately after receiving the bonds in question from the city clerk of the city of Santa Cruz, sold and hypothecated the same, and each and all thereof, for the sole benefit of said firm of Coffin & Stanton (pp. —).

25.

Error of said court in refusing to make the following additional finding of fact requested by said defendant:

"That the bonds and coupons mentioned and described in plaintiff's complaint, and each and all of them, were fraudulently taken by Walter Stanton from the custody of the city clerk of the city of Santa Cruz on or about the twenty-fourth day of April, 1894, and then and there by him, the said Walter Stanton, appropriated to his own use."

The court erred in refusing to make said additional finding of fact because it appears from the evidence that Walter Stanton procured said bonds to be issued by the city of Santa Cruz, and delivered to him by the city clerk of the city of Santa Cruz, with the fraudulent intent and purpose of appropriating said bonds, and each and all thereof, to his own use and to the use of the firm of Coffin & Stanton, and that, immediately after securing possession of said bonds, he did appropriate the same, and each and all thereof, to his own use and to the use of his said firm of Coffin & Stanton, and there is no evidence contradictory of or inconsistent with said evidence (pp. —).

26.

Error of said court in refusing to make the following addi-
509 tional finding of fact requested by said defendant: "That each and all of said bonds and coupons mentioned and set forth in plaintiff's complaint were, on or about the twenty-fourth day of April, 1894, wilfully, unlawfully and feloniously stolen, taken and carried away from the possession of the clerk of said city of Santa Cruz by Walter Stanton, a member of said firm of Coffin & Stanton."

The court erred in refusing to make said additional finding of fact because the evidence shows that Walter Stanton did, on or about the twenty-fourth day of April, 1894, obtain possession of the bonds and coupons mentioned and set forth in plaintiff's complaint

upon false and fraudulent pretenses and representations, with *interest* at the time of taking the same from the possession of the city clerk of the city of Santa Cruz to feloniously steal said bonds and coupons, and appropriate the same to his own use and to the use of the said firm of Coffin & Stanton. And there is no evidence contradictory of or inconsistent with said evidence (pp. —).

27.

Error of said court in refusing to make the following additional finding of fact requested by said defendant: "That all purchasers and holders of the bonds and coupons mentioned and set forth in plaintiff's complaint had full notice and knowledge at the time of purchasing the same that said bonds and coupons, and each of them and all of them, constituted part of an indebtedness to be contracted by the city of Santa Cruz over and above and in excess of 15 per cent. upon the assessed value of all taxable real and personal property in said city of Santa Cruz at the time of the issuance of such bonds."

510 The court erred in refusing to make said additional finding of fact for the following reasons, to wit: The undisputed evidence shows that all purchasers and holders of the bonds and coupons mentioned and set forth in plaintiff's complaint had knowledge from the recitals contained in each of said bonds that the same were issued pursuant to certain ordinances of the city of Santa Cruz and in pursuance of a vote of the qualified electors of the city of Santa Cruz called and held under an act of the legislature of the State of California entitled "An act to amend an act entitled 'An act authorizing the common council, board of trustees, or other governing body, of any incorporated city or town, other than cities of the first class, to refund its indebtedness, issue bonds therefor, and provide for the payment of the same (approved March 15, 1883),' approved March 1, 1893;" and upon a notice of such election alleged in said recitals to have been given and published in the manner required by law. The constitution of the State of California prohibited said city of Santa Cruz from contracting indebtedness or issuing bonds therefor except upon a vote of two-thirds of the qualified electors of such city by the following provisions of section 18 of article XI of said constitution: "No county, city, town, township, board of education, or school district shall incur any indebtedness or liability, in any manner or for any purposes, exceeding in any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose, nor unless before or at the time of incurring such indebtedness provision shall

511 be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within twenty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void."

Said act of March 1, 1893, required the previously existing in-

debtedness of the city of Santa Cruz, evidenced by the bonds and warrants thereof and sought to be refunded, to be specifically set forth in the notice of election, together with a specific statement of the number, character and amount of the refunding bonds to be issued therefor, by the following provision:

"The notice of such election shall recite the indebtedness to be refunded, together with the denomination, character, time of payment, rate of interest, as well as all other details of the bonds proposed to be issued."

An act of the legislature of the State of California, namely: "An act to amend section 5 of an act approved March 19, 1889, entitled, 'An act authorizing the incurring of indebtedness by cities, towns and municipal corporations incorporated under the laws of this State for the construction of water works, sewers, and all necessary public improvements, or for any purpose whatever;' and to repeal the act approved March 9, 1895, entitled 'An act to authorize municipal corporations of the fifth class, containing more than 3,000 and less than 10,000 inhabitants, to obtain water works,' also to repeal an act approved March 15, 1887, entitled, 'An act authorizing the incurring of indebtedness by cities, towns, and municipal corporations incorporated under the laws of this State, March 19, 1889,' approved March 11, 1891" (Statutes of California, 1891, p. 84)—prohibited said city of Santa Cruz from incurring any indebtedness for public improvements in excess of 15 per cent. upon the assessed value of the taxable real and personal property within the corporate limits of said city.

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Ordinance Nos. 314, 315, 320 of defendant, The City of Santa Cruz, set forth in the findings of fact filed herein and in the bill of exceptions filed herein, each showed clearly upon its face that said refunding bond issue added to the pre-existing indebtedness of the city of Santa Cruz, evidenced by the bonds and warrants thereof, would constitute an indebtedness of at least $631,000; whereas, the assessment-rolls (being public records required by law to be kept by the officers of the city of Santa Cruz) showed that the assessed value of all taxable real and personal property within the city of Santa Cruz was $3,907,404, as appears in the amended complaint of plaintiff; and said proposed refunding bond issue was in excess of 15 per cent. upon the assessed value of all of said taxable real and personal property in said city of Santa Cruz.

The bonds upon their face, and by their recitals, gave notice of, and put all purchasers upon inquiry, as to the said fact that said indebtedness exceeded said limit of 15 per cent., and the said recitals in said bonds referred to the vote at the special election, which was a matter of public record and notoriety, and which showed the said excess over 15 per cent.; and, moreover, as to the bonds purchased by E. G. & E. Wallace, they had further actual notice of said excess by the statement in the attorney's opinions furnished to them, stating expressly the amount of the refunding issue; and, moreover, as to the bonds held by John Branch, the Wakefield Trust Company of Wakefield, Rhode Island, the First National Bank of Worcester, Massachusetts, the Albany City national bank, the

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South Norwalk Savings Bank of South Norwalk, the Bank of Skaneateles, of Skaneateles, New York, the Kenduskeag National Bank of Bangor, Maine, the National Bank of Waterville, of Waterville, New York, and the First National Bank of Webster, Massachusetts, they had further actual notice of said excess from the circular or prospectus furnished them and each of them by Coffin & Stanton before their taking the bonds in question, which circular or prospectus shows the amount of the refunding bond issue, to wit: $360,000, and that said bonds were issued to refund outstanding bonds of said city of Santa Cruz to the amount of $320,000, issued for the purpose of obtaining water supply, and which said circular or prospectus further shows that the assessed valuation of all the assessed real and personal property in the city of Santa Cruz, at the time of the issuance of said refunding bonds, was $3,907,400.

Error of said court in refusing to make the following additional find- of fact requested by said defendant: "That 450 bonds of the denomination of $500 each, dated January 15, 1889, bearing interest at the rate of 5 per cent. per annum, issued by said city of Santa Cruz, for purchase and construction of the city water works, for the refunding of which, to the extent of $225,000, the refunding bonds mentioned and described in plaintiff's complaint were in part issued, were, and each of them was, issued, sold and delivered
514 by the city of Santa Cruz after the act of the legislature of the State of California authorizing their execution, issuance, sale and delivery had been repealed; namely, after the nineteenth day of March, 1889."

The court erred in refusing to make said additional finding of fact because it appears from the evidence, without contradiction, that nearly all of said 450 bonds of the denomination of $500 each, dated January 15, 1889, were issued and sold and delivered by the city of Santa Cruz after the nineteenth day of March, 1889, and that the act authorizing the execution, issuance, sale and delivery of such bonds was on the nineteenth day of March repealed (pp —).

29.

Error of said court in making, at the suggestion of plaintiff and against the objection of defendant, the following additional finding of fact, as an amendment to finding No. 12 of the original findings of fact filed in the cause, viz:

"Prior to the purchase of the bonds by E. G. & E. Wallace, Messrs. F. H. Prince & Co. submitted to them a copy of the following opinion of Z. N. Goldsby, the city attorney of the defendant, practicing law in the city of Santa Cruz, California, namely:

"'SANTA CRUZ, CAL., *April* 25, 1894.

I hereby certify that I have carefully examined all the steps taken and proceedings had relative to the issuance of $360,000 in 5 per cent. refunding bonds by the city of Santa Cruz, in the State of California, and the bonds issued pursuant thereto, dated April
515 16, 1894, and find said proceedings regular, and said bonds legally issued, and a valid and binding obligation of said city of Santa Cruz. Z. N. GOLDSBY.'

"And also submitted a copy of the following opinion of L. B. Gleason, an attorney-at-law, practicing in the city of New York, namely:

"'Messrs. Coffin & Stanton, 72 Broadway, New York city.

GENTLEMEN: I return herewith certified copies of the proceedings of the officials of the city of Santa Cruz, Cal., with reference to the issuance of the refunding bonds of said city, bearing date April 16, 1894. I have made a careful examination of these papers and of the constitution and statutes of the State of California, with reference to the issuance of refunding bonds by cities of said State. All the provisions of the constitution and the statutes of the State seem to have been most carefully and fully complied with, and from my examination I am of the opinion that these bonds are issued in pursuance of the laws relating thereto, and are legal and valid obligations of the said city of Santa Cruz.

Yours truly, LAFAYETTE B. GLEASON.'

"The copies of the opinion of Goldsby and of Gleason were furnished to F. H. Prince & Co. by Messrs. Coffin & Stanton. These opinions were not satisfactory to E. G. & E. Wallace, and they asked for the opinion of some attorney practicing law in the city of Boston.

F. H. Prince & Co. thereupon suggested that the opinion of
516 M. F. Dickinson, Jr., an attorney practicing in that city, should be obtained; this suggestion was satisfactory to E. G. & E. Wallace, and it was then agreed between F. H. Prince & Co. and E. G. & E. Wallace that the opinion of said Dickinson upon the question of the validity of said bonds should be obtained by F. H. Prince & Co. F. H. Prince & Co. then, on their own account and for themselves, and not acting as agents of E. G. & E. Wallace, employed said Dickinson to give his opinion in relation to the validity of such bonds, and as the result of such employment, and at the attorney of F. H. Prince & Co., Dickinson gave to F. H. Prince & Co. the following opinion, which was afterwards by said F. H. Prince & Co. submitted to E. G. & E. Wallace, prior to their purchase of such bonds:

"'BOSTON, *August* 29, 1894.

F. H. Prince & Co., 2 and 8 State street, Boston, Mass.

GENTLEMEN: I have examined the papers that you have submitted in regard to the $360,000 5 per cent. refunding bonds of the city of Santa Cruz, Cal., dated April 16, 1894. In my opinion, the bonds are legally issued in conformity to the laws of the State of California and the ordinances of the city of Santa Cruz, and constitute a legal and valid obligation of said city.

Very respectfully yours, M. F. DICKINSON, JR.'

"Said Dickinson had notice of all the matters recited in the *circumstances* of the defendant city, numbered 314, 315 and 320,
517 but Dickinson did not communicate this knowledge of said ordinances, or of any of the facts recited therein, to the said firm of E. G. &. E. Wallace; and the said Dickinson, in the exam-

ination of such ordinances, and in giving said opinion, was not the agent or attorney of E. G. & E. Wallace, but acted solely as the attorney of F. H. Prince & Co."

The court erred in making said additional finding of fact because it appears from the undisputed evidence that E. G. & E. Wallace specifically asked F. H. Prince, of the firm of F. H. Prince & Co., to produce for said firm of E. G. & E. Wallace the opinion of said M. F. Dickinson, Jr., as to the validity of the bonds and as to the regularity of the issuance thereof, and that F. H. Prince & Co. thereupon, not for themselves, but for the firm of E. G. & E. Wallace, consulted and employed said Dickinson, and procured from him, for said E. G. & E. Wallace, the opinion set forth in said finding upon the question of the validity of said bonds and the regularity of their issuance.

Said evidence is not contradicted, and is not inconsistent with any other evidence in the case, and it appears from said evidence that said Dickinson, in the examination of said ordinances and in giving said opinion, was the agent and attorney of E. G. & E. Wallace, and did not act solely or at all as the attorney of F. H. Prince & Co.

(Reference is here made to the testimony of Mr. Summer Wallace, of the firm of E. G. & E. Wallace, as found on pp. — of the record, and as set forth in assignment of error No. 23 hereof.)

518 30.

Error of said court in making and finding, at the suggestion of said plaintiff and against the objection of said defendant, that portion of said last-mentioned additional finding which reads as follows:

"F. H. Prince & Co. then, on their own account and for themselves, and not acting as agents of E. G. & E. Wallace, employed said Dickinson to give his opinion in relation to the validity of such bonds, and, as the result of such employment, and as the attorney of F. H. Prince & Co., Dickinson gave to F. H. Prince & Co. the following opinion, which was afterwards by F. H. Prince & Co. submitted to E. G. & E. Wallace, prior to their purchase of said bonds."

The court erred in making and finding said portion of said additional finding of fact because said portion of said finding is not supported by the evidence, nor by any evidence in the case, and is contrary to all the evidence upon that subject in the case in this That all of the evidence upon the subject of the employment of said Dickinson shows that he was employed by F. H. Prince & Co. as the agent of Messrs. E. G. & E. Wallace, not on account of nor for said F. H. Prince & Co., but on account of and for Messrs. E. G. & E. Wallace, the purchasers of said bonds.

(Reference is here made to the said testimony of Summer Wallace and Frederick H. Prince, as hereinbefore set forth and referred to.)

31.

Error of said court in making and finding, at the suggestion of plaintiff and against the objection of defendant, that portion of said last-mentioned additional finding which reads as follows: "The said Dickinson, in the examination of said ordinance, and in giving said opinion, was not the agent or attorney of E. G. & E. Wallace, but acted solely as the attorney of F. H. Prince & Co."

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The court erred in making and finding said portion of said finding because said portion of said finding was not supported by the evidence, nor by any evidence in the case, and is contrary to all the evidence in the case in this: That all of the evidence upon the subject of the employment of said Dickinson, and upon the subject of his advice and opinion concerning the validity of said bonds, shows that he was the agent and attorney of E. G. & E. Wallace, and did not act solely or at all as the attorney of F. H. Prince & Co. (pp. —).

32.

Error of said court in making and finding that portion of finding No. 8 of the original findings of fact filed herein on September 29, 1898, which is in the words and figures following: "On the twenty-sixth day of March, 1894, ordinance No. 320 was duly enacted by the mayor and common council of the defendant."

The court erred in making and finding said portion of said finding because the same is not supported by the evidence, nor by any evidence in the case, and is contrary to all the evidence in the case in this: That it appears from the evidence that said ordinance was not fully enacted, in that there had been no election of defendant prior to the twenty-sixth day of March, 1894; for the reason that no notice of such election was published or given as required by law (pp. — of the record), and that the polls at such purported election were closed one hour and fifteen minutes before the time provided by law for closing of the polls at such an election, less than one-half of the qualified electors of the city of Santa Cruz having, up to the time of the closing of the polls, voted at such election (pp. — of the record). That the bond issue sought to be provided for in said ordinance was not authorized by any vote or action of the people of the city of Santa Cruz prior to the date of the alleged adoption of said ordinance, for the reasons hereinbefore in this assignment of error made and given; that ordinances numbers 314 and 315 of said city of Santa Cruz (pp. — of the record), submitting the proposition of refunding the alleged bonded indebtedness of the city of Santa Cruz, etc., showed on their face that a part of such alleged indebtedness to be refunded consisted of indebtedness evidenced by the mortgage of a private corporation, to wit: the City Water Company of Santa Cruz, and that the question of refunding such purported indebtedness of said private corporation was so connected with the indebtedness evidenced by the bonds of the city of Santa Cruz that the electors of the city of Santa Cruz could not at such election vote for the refunding of the bonded in-

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debtedness evidenced by the bonds of the city of Santa Cruz and against the bonded indebtedness evidenced by the bonds of said private corporation, or *vice versa;* and that said alleged ordinance was not enacted by the mayor and common council of the defendant,
but was enacted by one William T. Jeter, pretending to act
521 as mayor in place of Robert Effey, the duly elected and qualified mayor of defendant, and by other persons claiming and pretending to act as the common council of defendant, but who were not at that time members of the common council of defendant (pp. —).

33.

Error of said court in making and finding that portion of finding of fact No. 12 of the original findings of fact filed herein, which is in the words and figures following:

"All of the assignors of plaintiff, other than the one referred to in finding No. 3, and E. G. & E. Wallace who purchased certain of the refunding bonds and coupons issued under the circumstances hereinafter set forth in this finding, were *bona fide* purchasers of the bonds and coupons assigned by them to plaintiff and sued on — this action, and were without notice of any fact tending to impeach the truth of the recitals in said bonds."

The court erred in making and finding said portion of said finding of fact No. 12, in that it appears from the evidence that all of the purchasers mentioned in said portion of finding of fact No. 12 of the original findings of fact herein had notice of the ordinances Nos. 314 and 315, set forth in the additional findings of fact filed herein, by express reference to said ordinances in the recitals contained in each of said bonds, and had knowledge from such ordinances that the refunding bonds in question were issued in part for the purpose of refunding the mortgage bonds of a private corporation, namely, the City Water Company of the City of Santa Cruz;
and for the further reason that the remaining portion of the
522 alleged indebtedness to be refunded, a large part, and nearly the whole thereof, other than said private mortgage bonds, was no indebtedness of said city at all, and the 450 purported bonds by which the same are claimed to have been evidenced were void as having been nearly all issued in violation of and without authority of the law after the repeal of the statute under which an attempt was made to issue them, as set forth in assignment No. 28; and had notice from said ordinances that the election required by law and by the constitution of California to be held upon the question of incurring indebtedness and issuing refunding bonds was not conducted in accordance with the laws of the State of California, relating to such elections in the city of Santa Cruz in this: That at said election the polls were to be opened at sunrise and closed at 5 o'clock in the afternoon of the day of election—one hour and fifteen minutes before the time provided by law for closing the poles at such election, and that no notice of such election was given or published as required by law and the ordinance of said city of Santa Cruz; and that the question of refunding the mortgage bonds of said pri-

vate water company was so united with the proposition to refund the indebtedness of said city of Santa Cruz, evidenced by the bonds and warrants thereof, that the electors of said city of Santa Cruz could not vote for the refunding of the said indebtedness evidenced by the bonds and warrants thereof and against the refunding of said bonded indebtedness of said private corporation.

And it appears from the uncontradicted evidence that all of the purchasers had notice through said ordinances and through
523 the assessment-roll of said city of Santa Cruz that said refunding bond issue constituted an increase of the bonded indebtedness of said city of Santa Cruz to an amount in excess of 15 per cent. upon the assessed value of all taxable real and personal property in said city, and therefore constituted an overissue of bonds contrary to the limitations imposed upon the contraction of indebtedness and the issuance of bonds on the part of said city of Santa Cruz by the laws of California (pp. —).

It further appears from the uncontradicted evidence that John Branch, of the city of Boston, State of Massachusetts, and plaintiff's assignor for the collection of one refunding fund, the first coupon of which is sued upon in this action, had actual notice of facts tending to impeach the truth of the recitals in said bond before coming into possession of it.

John Branch testified as follows (pp. — of the record):

"I have been the owner of one of the municipal bonds purporting to be executed by the defendant on April 16, 1894, that is, bond No. 297, for $1,000, principal due 1927. About September 1, 1894, I had $1,000 that I wanted to invest in some strong municipal bond, and about that time a representative of Coffin, of Coffin & Stanton, a bond house, as I supposed, of good repute in New York, offered me a Santa Cruz bond having a long time to run, bearing 5 per cent. at par and accrued interest, at 101, less 1 per cent. commission, and I thought the bond was a good purchase because the bond was a refunding bond, and, also, from their financial statement. When I purchased it I made no inquiries in regard to the outstanding indebtedness of the city of Santa Cruz, to refund which this
524 series of bonds was issued, nor did I make any inquiry in regard to the title of Coffin & Stanton, or any members of that firm to the bond, and had no knowledge in regard to their title from any source other than inquiries made by me. I had no knowledge relative to the condition of the outstanding indebtedness of the city of Santa Cruz further than the published statement made by Coffin & Stanton of the indebtedness, together with the assessed valuation and population, etc.—the usual statement furnished by bond houses. I was furnished by Coffin & Stanton with copies of an opinion of attorneys. The Santa Cruz attorney's name was Goldsby. My recollection is that they were both California attorneys. The opinions were sent to me with the bond. I examined them practically at the same time I paid for the bond. I felt that the house of Coffin & Stanton was a reputable house, and I knew about Santa Cruz, and that an obligation against them was good,

so I bought the bond in good faith, believing that it was good and would be paid."

It further appears from the uncontradicted evidence that the Wakefield Trust Company of Wakefield, Rhode Island, the owner of one of the bonds assigned to plaintiff herein for collection, had actual notice of facts tending to impeach the truth of the recitals in said bonds before coming into possession of it.

John Babcock, a witness who was sworn on behalf of plaintiff, testified: That he is the treasurer of said Wakefield Trust Company, and that said trust company had in its possession a $1,000 bond, purporting to be executed by the officers of the city of Santa Cruz on the sixteenth day of April, 1894, which said bond was
525 taken by said trust company from Coffin & Stanton as collateral security for a loan made to Coffin & Stanton by said trust company; that when said trust company made the loan to Coffin & Stanton they were furnished by Coffin & Stanton with a letter and circular relative to said refunding-bond issue, which said letter and circular are in the words and figures following, to wit:

"Coffin & Stanton, bankers, New York, London.

72 BROADWAY, NEW YORK, *Aug.* 26, 1894.

Wakefield Trust Company, Wakefield, Mass.

GENTLEMEN: We have disposed of the $2,000 Illinois Central 4 per cent. bonds which are held by you as part collateral to our loan, for immediate delivery, and therefore send you tonight, under separate registered cover, $1,000 City of Santa Cruz, Cal., 5 per cent. bond and $1,000 New York City Suburban Water Company 6 per cent. bond. Please send the Illinois Central bonds by return registered mail, we having insured them during transit. We enclose postage for that purpose.

You are doubtless familiar with the merits of the New York City Suburban bonds, as you at present hold a number of them as collateral to our loan. We might add that we have made quite a number of sales of these bonds within the past two weeks, at prices ranging from 100 to 102½ and interest.

We would call your attention to the fact that the city of Santa Cruz is a prosperous city located in the most highly im-
526 proved portion of the State of California, in the vicinity of San Francisco, being peopled principally by inhabitants from New York and the New England States, who have gone thither in search of a more congenial climate. The city's affairs are well and intelligently conducted, we having been its fiscal agents for many years, and never known it to default or delay in the payment of interest upon any of its bonds. This issue was purchased by us after a thorough investigation by our Mr. Stanton upon the ground, and after he had become satisfied as to the stability of the city and its future prospects. We consequently have no hesitation in recommending the bonds as an excellent investment.

Trusting that this substitution will meet with your approval, we remain,

Yours truly, COFFIN & STANTON.

T."

"Coffin & Stanton, bankers, New York, London.

We offer, subject to sale or advance in price,

$300,000

City of Santa Cruz, California, five per cent. refunding gold, dated April 16, 1894, due as follows:

Nine thousand dollars April 15, 1895, and $9,000 annually thereafter. Average time to run, twenty and one-half years. No option of redemption before maturity. Denomination, $1,000. Coupons annually, April 15. Payable at city treasurer's office, Santa Cruz. Real valuation, $9,768,600. Assessed valuation, $3,907,400. Total debt (this issue), $360,000. Issued to refund bonds (for
527 water supply), $320,000. Net debt, $40,000. Including the suburbs a total population of 11,000 is tributary to the water system. The corporate limits of the city *has* not been enlarged for many years.

The water plant is a gravity system, costing about $370,000.

A legal investment for savings banks in the States of Rhode Island, Pennsylvania, Maryland and New Hampshire. Price 101 and interest. Nets nearly 5 per cent.

Under the law governing savings banks investments in the State of Massachusetts, the debt issued for water supply is deducted from the gross debt on the theory that such property is self-sustaining, and no burden upon the city. In estimating the debt indebtedness this rule has been followed."

And that said circular above set forth gives the assessed valuation of all the real and personal property in the city of Santa Cruz and the total debt of said city, and thus clearly shows that the adding of the refunding bond issue to the then outstanding indebtedness of the city of Santa Cruz would necessarily increase the indebtedness of said city, if said bonds were valid, to an amount in excess of 15 per cent. upon the said assessed valuation of the real and personal property of said city.

It further appears from the uncontradicted evidence that the First National Bank of Worcester, Massachusetts, the owner of twenty-two of said refunding bonds assigned to the plaintiff for collection, had actual notice of facts tending to impeach the truth of the recitals in said bonds before coming into possession of
528 them. The plaintiff testified in his own behalf, and stated that he was the president of said First National Bank of Worcester, Massachusetts, and that said bank had acquired possession of 22 bonds on account of a loan of $25,000, made at that time of Coffin & Stanton and represented by a promissory note of Coffin & Stanton, and that $12,000 Illinois Central 4's, $18,000 City of Santa Cruz 5's, were pledged as collateral security for the payment of that

note, that he represented the bank in this transaction with Coffin & Stanton; that the bank made no investigation of the financial condition of the defendant prior to the making of this loan; but that Mr. Terrell, an agent of Coffin & Stanton, delivered to said plaintiff a circular (which was the same circular hereinbefore set forth), and that such circular gave all information that the First National Bank of Worcester had in regard to the financial condition of the city of Santa Cruz. It had no statement or opinion in respect to the validity of the issue. Mr. Terrell made satisfactory representations in regard to that.

It further appears from the uncontradicted evidence that the First National Bank of Hagerstown, Maryland, the holder of some of said refunding bonds assigned to plaintiff herein, had actual notice of facts tending to impeach the truth of the recitals in said bonds before coming into possession of them.

Frank W. Mish, an attorney for and director of said First National Bank of Hagerstown, Maryland, testified: That the said bank came into possession of bonds purporting to be executed by officers of the defendant on April 16, 1894; that said bonds were taken as security for a loan made to Coffin & Stanton; and
529 that said circular hereinabove set forth was furnished to said bank by said Coffin & Stanton before the transfer of said bonds to said bank.

It further appears from the uncontradicted evidence that the Albany City national bank, the holder of twenty of said refunding bonds assigned to plaintiff herein, had actual notice of facts tending to impeach the truth of the recitals in said bonds before coming into possession of them.

Jonas H. Brooks, a witness on behalf of the plaintiff, testified: That he was cashier of the Albany City national bank at Albany, N. Y.; that the refunding bonds held by said bank were obtained from Coffin & Stanton in the nature of collateral security for a loan made them; and that the said circular (hereinabove set forth) was also furnished to said Albany City national bank by said Coffin & Stanton before the consummation of the transaction.

It further appears from the uncontradicted evidence that the South Norwalk Savings Bank of South Norwalk, the holder of eleven of said bonds assigned to plaintiff herein, had actual notice of facts tending to impeach the truth of the recitals contained in said bonds before coming into possession of them.

John W. Ferriss, a witness on behalf of plaintiff, testified: That he is vice-president of the South Norwalk Savings Bank of South Norwalk; that the said eleven bonds purporting to be executed by officers of the defendants on the sixteenth of April, 1894, came into possession of the bank as collateral security for a loan made to Coffin & Stanton of New York, by said bank; and that, before the transfer of said bonds from Coffin & Stanton to said
530 bank, Coffin & Stanton had submitted to said bank the circular hereinbefore set out.

It further appears from the uncontradicted evidence that the Bank of Skaneateles of Skaneateles New York, the holder of five of said

bonds assigned to plaintiff herein, had actual notice of facts tending to impeach the truth of the recitals in said bonds before coming into possession of them.

Benjamin F. Petheram testified: That he is cashier of said Bank of Skaneateles, and that said bank made a loan to Coffin & Stanton on their note, and took the said five bonds as collateral security therefor; and that, before coming into possession of said bonds, the said Bank of Skaneateles was furnished by Coffin & Stanton with the circular set forth hereinabove.

It further appears from the uncontradicted evidence that the Kenduskeag National Bank of Bangor, Maine, the holder of twelve of the said bonds assigned to plaintiff herein, had actual notice of facts tending to impeach the truth of the recitals in said bonds before coming into possession of them.

Frederick W. Hill testified: That he is a director of said Kenduskeag national bank, and that the said bonds were taken by said bank as collateral for a loan made to Coffin & Stanton by said bank, and that, before said bonds came into possession of said bank, Coffin & Stanton furnished said bank with the circular hereinabove described, upon which the said bank relied.

It further appears from the uncontradicted evidence that
531 the National Bank of Waterville, of Waterville, New York, the holder of one of said bonds assigned to plaintiff herein, had actual notice of facts tending to impeach the truth of the recitals in said bonds before coming into possession of it.

Samuel W. Gildwin testified: That he is the president of the National Bank of Waterville; that the said bank came into possession of one refunding bond of the city of Santa Cruz, given as collateral security to a note of Coffin & Stanton; that he (the said president) had made a thorough investigation of the bonds at that time, having sent to him from Coffin & Stanton copies of letters from G. Bowman, then mayor of Santa Cruz, and also being told by Mr. Stanton that they had bought the bonds, and that they were the actual owners thereof, and that they did not at that time handle any bond except such as they were the actual owners of; and, also, that the bank was furnished with the said circular set forth above before it took the bond; and, further, that the bank relied upon the prospectus and previous investigation of other Santa Cruz bonds and the statement of Coffin & Stanton and the letter of G. Bowman, mayor; that the knowledge that the bank had concerning the value of the bond at the time it was taken by the bank, and the financial condition of the city of Santa Cruz, was derived from the prospectus sent to the bank by Coffin & Stanton, and the knowledge obtained in the previous investigations.

It further appears from the uncontradicted evidence that the First National Bank of Webster, Massachusetts, the holder of four of said bonds assigned to plaintiff herein, had actual notice of acts
532 tending to impeach the truth of the recitals thereof before coming into possession af them.

Edward L. Spaulding testified: That he is the cashier of said First national bank, and that said refunding bonds came into the

possession of said bank as collateral, being security for a loan advanced Coffin & Stanton by the bank, and that the said printed statement or circular above set forth was furnished said bank before it took the bonds.

And for the further reason that the bonds upon their face and by their recitals gave notice of and put all purchasers upon inquiry as to the fact that the indebtedness created by the refunding-bond issue, added to the pre-existing indebtedness of the city of Santa Cruz, exceeded the limit of 15 per cent., beyond which limit said city of Santa Cruz could not lawfully incur indebtedness; and the recitals in said bonds refer to the vote at the special election, which was a matter of public record and notoriety, and which showed the said excess over 15 per cent.

34.

Error of said court in making and finding that portion of finding of fact No. twelve of the original findings of fact filed herein, which said portion of said findings of fact is set forth and referred to in the assignment of error last hereinabove set forth, for the following reasons, to wit:

That the refunding act of 1893, under which the bonds here in question were issued, is in conflict with the constitution of the State of California in that said act is a local and special law
533 relating to a subject concerning which the constitution of the State of California required all laws to be general; that said bond issue was illegally made because in excess of the bonded indebtedness which the city of Santa Cruz could contract under the laws of the State of California in force at the time when said bonds were issued; that said refunding act, under which said bonds are alleged to have been issued, did not authorize the issuance of any bonds by the city of Santa Cruz, for the reason that, while the act in question gives the power to the governing body of any city within the classes selected to submit to the qualified electors thereof, at an election to be held for that purpose, the question of refunding its outstanding indebtedness, evidenced by bonds and warrants thereof, and specifies the manner in which said election shall be called and held, and the form of notice to be given of such election, there is no provision in the act, or in any other act or law of the State of California, as to what shall be the result of a vote favorable to refunding at such election, and that said refunding act does not say, either in terms or in substance, that if the vote at such election be favorable to refunding, the city or its governing body, or its executive head, or any other officer or agent, shall have power to make or issue refunding bonds; that said refunding act is unconstitutional in that it is in violation of the provision of the Constitution of the United States which forbids any State to pass any law impairing the obligation of a contract; that said bonds sued upon herein are payable only in gold coin of the United States, in violation of the provisions of said refunding act of 1893, under which said bonds were issued, which requires that bonds issued
534 under the terms and authority thereof shall be payable in gold coin of lawful money of the United States; that it ap-

pears from the uncontradicted evidence herein that said refunding bonds sued upon herein were not sold by the city of Santa Cruz for their face value in gold coin, as required by said refunding act of 1893, and that said city of Santa Cruz received no consideration whatever for said bonds (pp. — of the record); that it appears from the uncontradicted evidence herein that no notice of an election submitting to the electors of said city of Santa Cruz the question of refunding the bonded indebtedness thereof was ever given or published as required by law or at all (pp. — of the record) and that it appears from the uncontradicted evidence herein that no election was ever held or had in said city of Santa Cruz at which two-thirds of the electors of said city, voting at such election, voted in favor of issuing bonds for the purpose of refunding the outstanding indebtedness of said city as required by the constitution of the State of California, in this, to wit: that at the purported election held in said city of Santa Cruz, at which electors of said city voted on the proposition of refunding the outstanding indebtedness thereof, less than one-half of the qualified electors of said city voted and the poles at such purported election were closed 1 hour and 15 minutes before the time provided by law for their closing, and that such purported election was held and conducted without notice thereof given and published in the manner required by law or at all (pp. — of the record); that it appears from the uncontradicted evidence that the refunding bonds sued upon herein were not executed or issued by the city of Santa Cruz, and were not signed by the
535 mayor of the said city of Santa Cruz, but that the greater portion thereof (it being impossible to identify which portion of which bonds) were signed by one William T. Jeter on the afternoon of the sixteenth day of April, 1894, after the election and qualification of the successor of said William T. Jeter as mayor of the city of Santa Cruz, and after the term of said William T. Jeter as mayor of said city had expired, and while said William T. Jeter was neither *de jure* nor *de facto* mayor of said municipality, the city of Santa Cruz (pp. — of the record), and that it appears from the uncontradicted evidence herein that said refunding bonds, so sued upon, were issued in part for the refunding of the mortgage bonds of a private corporation, namely, the City Water Company of Santa Cruz, in violation of the provisions of the refunding act of 1893, under which said refunding bonds are alleged to have been issued, and in violation of the constitution of the State of California.

35.

Error of said court in making and finding that portion of finding of fact No. 12 of the original findings of fact filed herein, which is in the words and figures following, to wit:

"Therefore, knowledge of F. H. Prince & Co. concerning the illegality of said bonds, as shown by ordinances numbered 314, 315 and 320, was not constructive notice thereof to E. G. & E. Wallace."

The court erred in making and finding said portion of said finding because said finding is not supported by the evidence nor
536 by any evidence in the case, and is contrary to all of the evidence upon that subject in the case, and because the evidence

shows that F. H. Prince & Co. were, in the matter of purchasing the bonds in question, and in the whole of said transaction, the agents for all purposes of said E. G. & E. Wallace (pp. —).

36.

Error of said court in making and finding that portion of finding of fact No. 12 of the original findings of fact filed herein, which is in the words and figures following, to wit: "Nor did E. G. & E. Wallace have any actual knowledge or actual notice of said matters, nor of any fact tending to impeach the truth of the recitals contained in the bonds."

37.

The court erred in making said portion of said finding of fact number twelve of the original findings of fact filed herein in that it appears from the evidence that said E. G. & E. Wallace had notice of the ordinances Nos. 314 and 315 set forth in the additional findings of fact filed herein, by express reference to said ordinances in the recitals contained in each of said bonds, and had knowledge from such ordinances that the refunding bonds in question were issued in part for the purpose of refunding the mortgage bonds of a private corporation, namely, the City Water Company of the City of Santa Cruz; and had knowledge that the remaining alleged indebtedness of the city of Santa Cruz to be refunded, a large part, and nearly the whole thereof, other than said private mortgage bonds, was no indebtedness of said city at all, and the 450 purported bonds by which the same are evidenced were void
537 as having been nearly all issued in violation of and without authority of law after the repeal of the statute under which an attempt was made to issue them, as set forth in assignment No. 28; and had notice from said ordinances that the election required by law and by the constitution of California to be held upon the question of incurring indebtedness and issuing refunding bonds was not conducted in accordance with the laws of the State of California relating to such election in the city of Santa Cruz in this: that at said election the polls were to be opened at sunrise and closed at 5 o'clock in the afternoon of the day of election—1 hour and 15 minutes before the time provided by law for closing the polls at such election; and that the question of refunding the mortgage bonds of said private water company was so united with the proposition to refund the indebtedness of said city of Santa Cruz, evidenced by the bonds and warrants thereof, that the electors of said city of Santa Cruz could not vote for the refunding of said indebtedness, evidenced by the bonds and warrants thereof, and against the refunding of said bonded indebtedness of said private corporation; and that the notice required by law to be published and given of such election was not published or given and that no notice of such election was published or given. And it appears from the uncontradicted evidence that said E. G. & E. Wallace had notice through said ordinances and through the assessment-roll of said city of Santa Cruz, and through the vote at said alleged election, that said

refunding bond issue constituted an increase of the bonded indebtedness of said city of Santa Cruz to an amount in excess of
538 15 per cent. upon the assessed value of all taxable real and personal property in said city, and therefore constituted an overissue of bonds, contrary to the limitations imposed upon the contraction of indebtedness and the issuance of bonds on the part of said city of Santa Cruz by the laws of the State of California.

38.

Error of said court in failing to make any finding of fact whatever on the issue joined by the defendant's answer that at the time of the alleged election on the question of refunding the outstanding bonded indebtedness of the city of Santa Cruz, as set forth in plaintiff's amended complaint, the total outstanding indebtedness of said city of Santa Cruz, which was evidenced by regularly issued and valid bonds and warrants thereof, was $39,000, and no more, no part of which was at that time either due or payable.

39.

Error of said court in failing to make any finding of fact on the issue joined by the defendant's answer that 450 of the bonds of the city of Santa Cruz of the denomination of $500.00 each, to refund which in part the said purported election was held, and the refunding bonds sued upon herein, were and each of them was, invalid and void, for the reason that all and each of said bonds were and was executed, sold and delivered after the act of the legislature of the State of California authorizing their execution, sale and delivery had been repealed, namely, after the nineteenth of March, 1889.

539 40.

Error of said court in failing to make any finding of fact on the issue joined by the defendant's answer that at the time of the execution, issuance, sale and delivery of said 225 bonds of the city of Santa Cruz, the sum thereof, namely, $225,000.00, was in excess of the amount of the indebtedness which the city of Santa Cruz might lawfully incur at the time of the execution, issuance, sale and delivery thereof for the purpose of which said bonds were issued, namely, for public improvements.

41.

Error of said court in failing to make any finding of fact on the issue joined by the defendant's answer that the 89 so called first-mortgage bonds of the private corporation of the City Water Company of Santa Cruz, of the denomination of $1,000.00 each, were, and each of them was, without right and without authority, issued by a private corporation known as the City Water Company of Santa Cruz upon a pretended mortgage, executed without right or authority by said private corporation, upon municipal property of the city of Santa Cruz, and that no part of the sum of said so-called first-mortgage bonds, nor of said mortgage, is or ever was a part of the municipal indebtedness of the city of Santa Cruz, and no part

thereof was ever evidenced by bonds and warrants of the city of Santa Cruz.

42.

Error of said court in failing to make any finding of fact on the issue joined by the defendant's answer that no election was on the thirteenth of March, 1894, or at any other time at all, held
540 or conducted in the city of Santa Cruz on the question of refunding the outstanding indebtedness or any indebtedness of said city.

43.

Error of said court in failing to make any finding of fact on the issue joined by the defendant's answer that the alleged refunding bonds or obligations of the city of Santa Cruz described in the plaintiff's amended complaint, together with the alleged coupons thereto attached, including the 9 alleged bonds and the 282 alleged coupons sued upon by plaintiff herein, were, and each of them was on the twenty-third day of April, A. D. 1894, by one Walter Stanton, willfully, unlawfully and feloniously taken, stolen and carried away from the possession of the city clerk of the said city of Santa Cruz.

44.

Error of said court in failing to make any finding of fact on the issue joined by the defendant's answer that the pretended issue of 360 of the so-called refunding bonds of the par value of $1,000.00 each on the sixteenth day of April, 1894, as set forth in the plaintiff's amended complaint, was an unlawful attempt without authority on the part of the mayor and common council of the city of Santa Cruz, to increase the bonded indebtedness of said city beyond the limit of 15 per cent. upon the assessed value of all the taxable real and personal property of said city as prescribed and fixed by the laws of the State of California.

45.

Error of said court in failing to make any finding of fact on the issue joined by the defendant's answer that said pretended
541 issue of 360 so-called refunding bonds of the par value of $1,000.00 each on the sixteenth day of April, 1894, as set forth in plaintiff's amended complaint, and every part and portion of said pretended bond issue, and each and every pretended bond thereof, is, and at all times has been, an attempted overissue of municipal bonds of the city of Santa Cruz.

46.

Error of said court in failing to make any finding of fact on the issue joined by the defendant's answer that said so-called refunding bond ssued upon herein and the coupons thereto, and each and all of them, were and was fraudulently taken by one Walter Stanton from the custody of the city clerk of the city of Santa Cruz on or about the twenty-fourth day of April, 1894, and then and there by him, the said Walter Stanton, appropriated to his own use.

47.

Error of said court in making and finding that portion of the first conclusion of law found by said court, which reads as follows: "That William T. Jeter was *de facto* mayor of the defendant city of Santa Cruz on the sixteenth day of April, 1894, and so continued until May 7, 1894," for the following reasons:

That said portion of said conclusion of law is not supported by any of the findings of fact herein.

That it appears from the ninth finding of fact herein that William T. Jeter was duly elected mayor of the city of Santa Cruz on May
11, 1892, and that his successor, Robert Effey, was duly elected
542 mayor of said city on the ninth day of April, 1894, and duly qualified as such mayor between the hours of 11 o'clock a. m., and 2 o'clock p. m., of April 16, 1894; that upon the qualification of Robert Effey as mayor of Santa Cruz he became the *de jure* mayor of said city of Santa Cruz; that thereafter, on said sixteenth day of April, 1894, the said William T. Jeter performed no function, and exercised no act, either publicly or notoriously, which gave notice to, or caused the people of the city of Santa Cruz to believe or to know that he was acting as, or intended to act as, or was exercising the functions of, or intended to exercise the functions of the office of mayor of the city of Santa Cruz.

That it appears from finding of fact No. 13, that some of the bonds sued upon herein were signed by William T. Jeter on April 16, 1894, after the qualification of his successor in the office of mayor; and it does not appear from the finding of fact, or any finding of fact herein, that at the time of signing said bonds said William T. Jeter was either publicly or openly or notoriously exercising the functions of — attempting to exercise the functions of mayor of said city of Santa Cruz; and that it does not follow from the facts found that said Jeter was at any time after the qualification of his successor the *de facto* mayor of said city, and no facts are found showing that he was such *de facto* mayor during such time.

48.

Error of said court in making and finding that portion of the first conclusion of law found by said court which reads as follows: "And
that he, and the persons who assumed to act as members of
543 the common council of defendant, on the sixteenth and twenty-third days of April, 1894, to wit: J. F. Hoffman, E. G. Greene and F. W. Lucas, were on those days the *de facto* mayor and the *de facto* members of the common council of the defendant city," for the following reasons to wit:

That said portion of said conclusion of law is not supported by any finding of fact herein.

That it appears from the findings of fact herein that on the ninth day of April, 1894, Robert Effey was duly elected as mayor of said defendant city to succeed William T. Jeter, and duly qualified as such between the hours of 11 o'clock a. m. and 2 o'clock p. m. of April 16, 1894, and Messrs, Henry G. Insel, John Howard Bailey, J. D.

Maher and Frank K. Roberts were on the said ninth day of April, 1894, duly elected members of the common council of said defendant city, and all of them duly qualified as such councilmen before the meeting of the common council of said defendant, held April 16, 1894; and that it does not follow from the facts found that said Jeter was at any time after the qualification of his successor on the sixteenth day of April, 1894, the *de facto* mayor of said city of Santa Cruz, or that said Hoffman, Greene and Lucas were at any time after the qualification of their successors as members of the common council of said city of Santa Cruz *de facto* members of said common council; and no facts are found showing that said Jeter was *de facto* mayor, or that said Hoffman, Greene and Lucas were *de facto* members of the common council during such time.

49.

Error of said court in making and finding that portion of conclusion of law No. 1 herein which reads as follows:

544 "And that the bonds and coupons sued on are upon their face valid obligations of the defendant," for the following reasons, to wit:

That said portion of said conclusion of law is not supported by the findings of fact herein, nor by any finding of fact herein.

That the act of the legislature of the State of California entitled "An act to amend an act entitled 'An act authorizing the common council, board of trustees, or other governing body of any incorporated city or town, other than cities of the first class, to refund its indebtedness, issue bonds therefor, and to provide for the payment of the same (approved March 15, 1883),' (approved March 1, 1893)," by authority of which, and under the terms of which, it is alleged that the bonds sued on were issued, is in conflict with the constitution of the State of California in that said act is a local and special law relating to a subject concerning which the constitution of the State of California requires all laws to be general.

That said bonds and coupons were and are invalid because in excess of the amount of bonded indebtedness which the city of Santa Cruz could contract under the laws of the State of California in force at the time when said bonds were issued.

That the said act of the legislature of the said State of California above referred to and entitled, did not authorize the issuance of any bonds by the city of Santa Cruz, for the reason that, while the act in question gives power to the governing body of any city within the classes limited to submit to the qualified electors thereof, at an election to be held for that purpose, the question of refunding

545 its outstanding indebtedness evidenced by bonds and warrants thereof, and specifies the manner in which elections shall be called and held and the form of notice to be given of such election, there is no provision in the act, nor in any other act or law of the State of California, as to what shall be the result of a vote favorable to refunding at such an election, and that said refunding act does not say, either in terms or in substance, that if the vote at such election be favorable to refunding the city or its governing

body, or its executive head or any other officer or agent, shall have power to make or issue refunding bonds.

That said refunding act under which said bonds are alleged to have been issued is unconstitutional in that it is in violation of the provision of the Constitution of the United States, which forbids any State to pass any law impairing the obligations of a contract.

That said bonds show upon their face that they are invalid for the reason that they are payable in gold coin of the United States, in violation of the provision of said refunding act of 1893, under which said bonds were issued, which requires that said bonds issued *under the terms and authority thereof shall* be payable in gold coin or lawful money of the United States.

That it appears from the findings of fact herein that a large portion of said bonds, which portion it is impossible to identify, were not executed by the city of Santa Cruz, nor signed nor executed by any officer thereof, but were on the sixteenth day of April, 1894, after the qualification of his successor, signed by one William T. Jeter, pretending to act as mayor of said city of Santa Cruz,
546 after his term of office has expired, and while he was no longer either a *de jure* or a *de facto* officer of said municipality.

That it appears in the findings of fact herein that the plaintiff did not pay any money consideration for said bonds, but that they were assigned to him without consideration and for collection only.

That it appears from the findings of fact herein that said bonds constituted and overissue of indebtedness of the city of Santa Cruz, in violation of the laws of the State of California.

That it appears in the findings of fact herein that said bonds were issued in part for the purpose of refunding the mortgage bonds of a private corporation, to wit: the City Water Company of Santa Cruz, which said bonds were neither bonds nor warrants of said defendant The City of Santa Cruz, and were not evidences of the indebtedness of the City of Santa Cruz.

That it appears in the findings of fact herein that ordinance No. 315 of said defendant city, dated February 26, 1894, provided for and required notice to be given of an election to be held for the purpose of submitting to the qualified electors of said city of Santa Cruz the question of refunding the outstanding indebtedness thereof, which said ordinance directed the city clerk to cause to be published in the "Santa Cruz Surf" and "Santa Cruz Sentinel," for not less than ten days before the thirteenth day of March, 1894, a notice of such special election, and to post said notice at each place of election in said city, and which ordinance further provided that the notice so to be published and posted should be substantially in the words and figures set out in said ordinance, and should con-
547 tain, among other things, a recital of the indebtedness to be refunded, together with the denomination, character, time of payment, rate of interest, as well as all other details of the bonds proposed to be issued, and that the polls at such election would be

opened at sunrise in the morning of said day of election, and should close at 5 o'clock p. m. of the same day.

And it further appears from said findings of fact that such notice of election, so provided for and required to be given and published, was not in fact either given, made or published as required by said ordinance or by the laws of the State of California, or at all, and that no notice of such election was ever given or published.

That it further appears from said findings of fact that said ordinance No. 315 of said city of Santa Cruz, being the only ordinance providing for notice to be given of such election, required that the polls at such election should be opened at sunrise in the morning of said day, and should close at 5 o'clock p. m. of said day in violation of the laws of the State of California then in force which required that the polls at such election should not be closed until sundown of the day thereof, and that it appears from said findings of fact that the polls at such alleged election were opened and closed at the hours named in said ordinance, in conflict with and contrary to the provisions of the laws of the State of California with reference to the opening and closing of polls at such an election.

That it appears from said findings of fact that ordinance No. 314 of said defendant The City of Santa Cruz, calling an election for the purpose of submitting to the qualified electors of said defend-
548 ant city the question of issuing bonds to refund the outstanding indebtedness thereof, and ordinance No. 315, providing the form of notice to be given of such election and requiring the clerk of said city to publish the notice aforesaid, each showed upon its face that the alleged indebtedness to be refunded consisted in part of 89 bonds of the private corporation the City Water Company of Santa Cruz, which said bonds were of the value of $89,000.00 and which said bonds were neither valid nor existing indebtedness of the city of Santa Cruz, nor did they constitute or evidence any indebtedness of the city of Santa Cruz represented by bonds or warrants thereof; and that it was impossible for the electors of said city of Santa Cruz, or any elector of said city, at such election, so called, to vote in favor of refunding the indebtedness of the city of Santa Cruz evidenced by bonds or warrants thereof and against the refunding of indebtedness evidenced by the bonds of said private corporation the City Water Company of Santa Cruz.

That it appears from the findings of fact that no election was ever held in the city of Santa Cruz, nor by the electors thereof, for the purpose of determining the question of the refunding the outstanding indebtedness of the city of Santa Cruz evidenced by bonds or warrants thereof.

That it appears from said findings of fact that no election was ever held in the city of Santa Cruz, nor by the electors thereof, for the purpose of determining the question of refunding any indebtedness whatever.

That it appears in said findings of fact that said bonds were never issued by the defendant The City of Santa Cruz, but that,
549 on the sixteenth day of April, 1894, one William T. Jeter, pretending to act as mayor of said city, and J. Howard

Bailey, F. J. Hoffman, E. G. Greene and F. W. Lucas, pretending to act as the common council of said city, in violation of law, and without bids therefor having been received for the purchase of said bonds, and without authority of law, accepted a certain proposition of Coffin & Stanton to take said bonds, and all thereof, which proposition is dated February 27, 1894, and is set forth in finding of fact No. 10 herein.

That said proposition was illegal, and that said persons so pretending to act as mayor and common council of said city of Santa Cruz had no authority or right to accept said proposition.

That it further appears from said findings of fact that the said William T. Jeter, pretending to act as mayor of said city, and the said Lucas, Bailey, Hoffman and Greene, pretending to act as members of the common council thereof, without authority of law, and without any right or authority whatever in the premises, and in direct violation of the laws of the State of California, and particularly in violation of the provisions of the refunding act of 1893, under which it is alleged said bonds were issued, directed the clerk of said defendant city to deliver said refunding bonds and all thereof to Coffin & Stanton, without consideration and without any value whatever of any kind being received therefor; and that said bonds were, in accordance with such direction, delivered to Coffin & Stanton on April 24, 1894.

That it further appears from said findings of fact that said proposition of Coffin & Stanton above referred to and set forth in
550 finding No. 10 herein, was never in fact carried out by said Coffin & Stanton or by any one, and that the city of Santa Cruz received no consideration whatever for said bonds or for any of them.

That it appears affirmatively from said findings of fact that, except as against *bona fide* purchasers without notice, for a valuable consideration, said bonds were invalid and did not constitute valid or other obligations of the defendant; that the only allegation of the complaint herein in regard to the character of the plaintiffs as *bona fide* holders without notice was, that said bonds were delivered to one Walter Stanton, for value received, and that said Stanton, afterwards and before the maturity thereof, sold and delivered to the plaintiff herein certain of said bonds and certain coupons.

That there is no evidence of finding to sustain said allegations of said complaint, but that, both the findings and the evidence show that the same were untrue and that said bonds were not delivered, nor were any of them delivered, to said Stanton, nor was any value received therefor, and that said Stanton did not sell or deliver any of said bonds or coupons to the plaintiff.

That the only authority for the issuance or delivery of said bonds is that contained in the statutes of California; and that by the provisions of said statutes the condition precedent to the exercise of such authority was the existence of an outstanding indebtedness evidenced by bonds and warrants of the city or town, and that, when such valid indebtedness so evidenced did actually exist, said authority could only be exercised in strict pursuance of the pro-

visions of said statutes, especially the statute of March 1,
551 1893, including an election to be held for the purpose of refunding such indebtedness and such indebtedness only, and that, in such case, it was necessary, under the statute, that the notice of such election should recite such indebtedness and show the same to be a valid indebtedness of said city or town to the extent of which indebtedness only could refunding bonds be issued.

That the questions of the existence of such indebtedness and of the sufficiency of such notice of election and the recitals thereof were strictly jurisdictional and went to the foundation and essence of the power of the common council, board of trustees, or other governing body, to proceed under such statute, and such questions were not left to the determination of such common council, board of trustees or other governing body thereof, and that they could not give themselves jurisdiction by any determination or recital of that nature; and that, according to said statute, said refunding bonds could only be issued and disposed of in the manner specified in said statute, to wit, by being sold in the manner provided by such city council, or the governing body to the highest bidder for not less than their face value, and that, in such event, the proceedings of such sale must be placed in the treasury to the credit of the funding fund and applied only for the purpose of refunding the indebtedness for which they had been issued, and that under said statute, such proceedings, after the issuance of said bonds, to wit, the selling thereof and the placing of the proceeds, were also jurisdictional, and the fact that they had been had in accordance with law was not committed by the law to the determination and the decision of said officials of said city or town and could not be concluded
552 thereby; and that it appeared on the face of said bonds that they were issued for the purpose of refunding the bonded indebtedness of said city of Santa Cruz, issuing bonds therefor, and providing for the payment of the same, under the said statute approved March 1, 1893, and in pursuance of the ordinances of the city of Santa Cruz and of a vote of the electors of said city of Santa Cruz voting at an election called and held under said statute, and that therefore every purchaser of said bonds was affected with notice of said statute and all its conditions, requirements and limitations, and had notice of said ordinances and said notice of election, and that said statute had not been complied with, and that the debts ought to be refunded was not such an indebtedness as could be refunded under said statute, and that said election was not held according to law nor called according to law, and was put upon inquiry as to all the actual facts concerning the attempt to refund said indebtedness and make and issue said bonds; and that such inquiry, being pursued with ordinary diligence would necessarily have resulted in the ascertaining from record evidence and authentic documents and official documents of the facts showing the entire invalidity of said bonds, and all such purchasers were bound to know the terms of said statutes; and that there was no authority conferred by said statutes or by any law of California upon said municipality to issue negotiable bonds, or bonds negotiable in the sense of pre-

cluding an inquiry between the municipality and such purchasers into the actual facts concerning the validity of said bonds.

553 50.

Error of said court in making and finding conclusion of law No. 2 herein, to wit: "That E. G. & E. Wallace were *bona fide* purchasers of the bonds and coupons assigned by them to plaintiff without notice of the facts recited in the ordinances of the defendant numbered 314, 315 and 320, and without notice of any fact tending to impeach the truth of the recitals contained in said bonds," for the following reasons, to wit:

That said conclusion of law is not supported by the findings of fact herein, nor by any finding of fact herein.

That for the reasons, and each thereof, assigned and given in assignment of error No. 491 said E. G. & E. Wallace had full notice of all the facts tending to impeach the truth of the recitals contained in said bonds, and for the further reasons:

That in addition to the recitals on said bonds, the said E. G. & E. Wallace did not rely solely upon said recitals, and did not purchase said bonds on the faith of any representations, assertions or acts of the said city of Santa Cruz, but did in fact institute, and cause to be instituted by their agents and attorneys, an inquiry going back of and beyond the face of the bonds into their sufficiency and the regularity of the proceedings leading up to their issue, and particularly, in that respect, procured and obtained, before purchasing said bonds, the opinions of Z. N. Goldsby, Lafayette B. Gleason and F. M. Dickinson, Jr., attorneys mentioned in the findings herein from the face of which opinions said E. G. & E. Wallace were further informed that said attorneys had had and examined and

554 considered all the documentary and other evidence bearing upon the validity of said bonds and had been fully informed of all the facts showing the invalidity thereof, and had had full notice of the fact that said ordinance submitted a proposition to refund indebtedness which could not be refunded under the statute, and that the notice of election also showed that the indebtedness so refunded was such as the city had no power to refund under the statute, and that the election was not called or had according to law and the statute, and that the bonds were not sold or disposed of as required by law; and, having so sought and obtained such information, and relying upon the opinions of said attorneys and the result of their investigations, said E. G. & E. Wallace could not claim to be *bona fide* purchasers or to be entitled to any estoppel against the city arising on the face of the bonds, but, having made such investigation and inquiry, and having acted upon said opinions and reports of their agents and attorneys as aforesaid, they were bound by the result and all of the results of such an investigation and cannot escape the imputation of any knowledge resulting from a diligent and full investigation of the sources of inquiry open to them and to all the world on the face of authentic and recorded and official documents; and for the further reason that said E. G. & E. Wallace, as appears by the findings herein, were affected with actual

notice of all the facts showing the invalidity of said bonds by reason of such actual notice on the part of F. H. Prince & Company, their agents in the transaction.

51.

555 Error of said court in making and finding the general conclusion of law that the plaintiff is entitled to recover as against the defendant on all the bonds and coupons assigned to him excepting the three coupons assigned to him by the Northern Counties Investment Trust Company, Limited, a judgment in the sum of $22,950.00 and interest thereon from April 15, 1895, and costs of suit, for the reasons heretofore assigned in assignments Nos. 47, 48, 49 and 50 hereof.

52.

The defendant assigns for error herein that the court erred in rendering the judgment herein against the defendant upon its findings of fact herein in that, the facts found by the court do not sustain the judgment rendered by the court, and that, upon said findings, either a judgment should be rendered for the defendant, or a *venire de novo* should be ordered for insufficiency of the findings; and defendant specifies that it appears from said findings that the refunding bonds issued by the defendant, and of certain of which bonds and coupons attached thereto the plaintiff claims to be the owner and holder, were issued without authority of law and in disregard of the provisions of the statute under which they purport to have been issued, and were not valid obligations of the defendant in that it appears from said findings that the indebtedness to refund which said bonds were issued was not a valid indebtedness of the city of Santa Cruz evidenced by its bonds or warrants, but that the proposition submitted to the voters was as specified in the notice of election and in the ordinance of the city recited in the bonds, a proposition to refund not only certain bonds purporting to be the bonds of the city of Santa Cruz but also certain other bonds,

556 to the amount of $89,000.00, which were the bonds of a private corporation and not of the city of Santa Cruz, and that, of the remainder of said indebtedness proposed to be refunded, all but $39,000.00 thereof was not a valid indebtedness of the city of Santa Cruz, but consisted of bonds illegally issued by said city for improvement purposes, and issued after the repeal of the only law authorizing the issuance thereof, and that there is no finding of fact that E. G. & E. Wallace were *bona fide* purchasers of the bonds and coupons assigned by them to plaintiff without notice, and that the findings of fact show that none of the assignors of plaintiff were such *bona fide* purchasers without notice because the findings show that the recitals in said bonds and the face thereof, taken in connection with the statute of which all purchasers were affected with notice, showed the invalidity of said refunding issue, and that the same were not issued in pursuance of the statute of 1893, or to refund an indebtedness of the city of Santa Cruz, evidenced by bonds or warrants thereof, and showed that the provisions of the statute had been followed and complied with; and the notice of

election and ordinance recited in said bonds also showed that said bonds were issued in part for an indebtedness not that of the city of Santa Cruz or evidenced by its warrants or bonds, and that the election had not been properly held in pursuance of the statute

And said findings of fact show that said issue of $360,000.00 worth of bonds for refunding purposes was an overissue and beyond the authority and power of the city officials to make, in that the same, when issued, constituted an indebtedness greater than 15 per cent. of the assessed valuation of the real and
557 personal property of said city; and said findings of fact show that said bonds were not sold as required by the statute to the highest bidder or for not less than their face value in the character of money in which they were payable, and said findings show that said bonds were not executed or issued by legal or proper officials of said city in that the greater portion thereof were signed by one William T. Jeter after his term of office as mayor of said city had expired and at a time when he was neither *de facto* nor *de jure* mayor of said municipality.

And the said findings of fact further show that said refunding-bond issue was never issued by said defendant The City of Santa Cruz, but that the same was, by certain individuals pretending to act as members of the common council of said city, but who had no right or authority so to act, and who were, at the time, neither *de facto* nor *de jure* members of the common council of said city, unlawfully ordered to be delivered by the city clerk of said city to Coffin & Stanton under the terms of an illegal contract therefore accepted by said individuals pretending to act as such common council without authority, as aforesaid.

And that said findings further show that the city was not and could not be estopped from setting up, as against any purchasers of said bonds, the illegality and invalidity thereof, and that all the purchasers thereof were not purchasers in good faith and for value and without notice, but were affected with notice of the invalidity of said bonds in that the authorities of said city had no jurisdiction, power or authority to submit any proposition to the voters of said city for the refunding of anything but a legal indebtedness
558 of said city, and had no authority to issue said refunding bonds except for such legal indebtedness, and that such want of authority could not be concluded by any recitals in the bonds, and that all purchasers thereof, by the recitals in the bonds, were referred to the notice of election and to the ordinance recited in said bonds, and which were, and were required by law to be, matters of record in writing, and could easily have been ascertained upon the minutes and recorded proceedings of the city officials; and that the question whether such refunding bonds were issued to refund a valid indebtedness of the city was one not committed by law to the decision and determination of the city officials, but was a fact and condition precedent to the exercise of their power in the premises, and was a fact ascertainable by an inspection of said notice of election and of said ordinance, and of which all intending purchasers of said bonds were required to take notice at their peril.

That there is no finding of fact that said purchasers took said bonds in reliance of any of the recitals thereof or any representations made by the city officials, and, so far as E. G. & E. Wallace are concerned, the findings show that they did not so rely, but instituted an independent investigation of their own and employed attorneys and agents to investigate into the facts of the issuance of said bonds and into the proceedings taken by the city officials in issuing the same, and were informed by the opinions of their said attorneys of facts which rendered it their duty to pursue said investigations, and their said attorneys and agents, in the course of said investigation did have full and actual knowledge of the said notice of election and of the said ordinance recited in said
559 bonds and of all the other facts concerning the issuance thereof, and such knowledge of such agents and attorneys was and became the knowledge of all purchasers of said bonds.

And said findings further show that all purchasers of said bonds had notice that the statute under which the same purported to have been issued conferred no authority upon the city officials to issue negotiable bonds which would have the effect of putting off defenses against the city or of estopping the city or precluding the city from setting up, as against such purchasers, the actual facts concerning the validity of said bonds.

53.

The findings do not support the judgment in this: That said findings show that no election was ever held in the city of Santa Cruz, or by the electors thereof, for the purpose of determining the question of issuing bonds to refund the outstanding indebtedness of said city evidenced by bonds and warrants thereof, and that the findings further show that the bonds in question here were illegally issued, without the assent of two-thirds of the qualified electors of said city of Santa Cruz, or any number or portion of the qualified electors of said city of Santa Cruz, voting at an election held for that purpose, as required by section 18 of article XI of the constitution of the State of California.

54.

That the findings are insufficient to sustain the judgment in that the statute of the State of California approved March 1, 1893, required that the election should be called and held in the same manner as other elections are held in such city or town, and
560 that the notice of such election should recite the indebtedness to be refunded, together with the denomination, character, time of payment, rate of interest, as well as all other details of the bonds proposed to be issued; and the findings show that the bonds in question recited that they were issued under said statute and in pursuance of a special election called and held under said statute and in pursuance of an ordinance of the city of Santa Cruz calling said election and submitting said question of refunding to said electors, and that said notice of election and said ordinance were matters of public record required by law to be kept and open

to the inspection of all, and such ordinance and notice of election were and constituted notice to all intending purchasers of the invalidity of said bonds and of the fact that the city authorities in passing said ordinance and calling said election had proceeded without authority or jurisdiction, and that the indebtedness proposed to be refunded was not such indebtedness as said statute authorized to to be so refunded, and was not as indebtedness of the said city of Santa Cruz.

And said findings further show that no other recitals in said bonds could estop said city from setting up the facts aforesaid as against purchasers of said bonds, and that the decision of the question whether said indebtedness was the indebtedness of the city of Santa Cruz was not by law remitted to the determination of said city officials and could not be concluded by any recitals on said bonds.

55.

The findings are insufficient to support the judgment in that there is no finding of fact that E. G. & E. Wallace were *bona*
561 *fide* purchasers of said bonds or purchasers thereof without notice.

56.

The findings are insufficient to support the judgment in that the complaint alleges that the defendant, for value received, delivered the 360 bonds, with the coupons thereto attached, to one Walter Stanton who, afterwards and before the maturity thereof, sold and delivered to the plaintiff herein the nine bonds of the first series, numbered from 1 to 9, both inclusive, and 282 of the coupons maturing on April 15, 1895, which allegations of said complaint were denied by the answer, and there is no finding upon said issues, and no finding that said bonds were so delivered to Walter Stanton, or that Walter Stanton afterwards sold or delivered the same or any thereof to the plaintiff herein.

57.

The findings are insufficient to support the judgment in that there is no finding that the assignors of plaintiff were purchasers in good faith and for value, in that it is not found that such purchasers did not have notice of facts sufficient to put them upon inquiry as to the validity of said bonds, nor that such inquiry, if prosecuted with reasonable diligence, would not necessarily have resulted in the disclosure of the facts showing the invalidity of said bonds.

58.

The findings are insufficient to support the judgment in this: That the findings show that the attorneys whose opinions were submitted to E. G. & E. Wallace and F. H. Prince & Company
562 were the agents and attorneys of E. G. & E. Wallace, and that E. G. & E. Wallace, before purchasing said bonds, had actual notice that the said F. H. Prince & Company and the said

attorneys had and had examined the ordinances and other proceedings recited in said bonds and had actual knowledge of all the facts showing the invalidity of said refunding issue, and that the knowledge of said attorneys and of said agents was the knowledge of the said E. G. & E. Wallace.

59.

That the findings are insufficient to sustain the judgment for the reasons and in the particulars assigned and specified in assignments 47, 48, 49, 50 and 51.

60.

The findings do not support the judgment in that it appears from said findings that on March 13, 1894, the defendant had an outstanding bonded indebtedness of $271,000, which indebtedness had been incurred in the acquirement of public improvements by said city of Santa Cruz.

And the findings further show that the issuance of the refunding bonds in question created an indebtedness in excess of the limitation imposed by an act of the legislature of the State of California, approved March 11, 1891, which said act provides that no city, town, or municipal corporation shall incur an indebtedness for public improvements which shall in the aggregate exceed 15 per cent. of the assessed value of all the taxable real estate and personal property of such city, town or municipal corporation. (Statutes of 1891, page 84.)

563 61.

The findings are insufficient to support the judgment in this: that the findings show that apart from the question of estoppel by recitals and the rights of a *bona fide* purchaser for value before maturity, the bonds were invalid and constituted no obligations of the city on account of the failure to comply with the conditions upon which under the statute pursuant to which they purport to have been issued, such bonds could be issued, and no authority existed under the laws of California on the part of such municipalities as the defendant to issue negotiable bonds, and by the law of California the issuance of such bonds is not within the scope of the general and ordinary powers of the municipality, and such bonds can be legally issued only by express authority of the legislature. All who deal in such bonds are bound to know the authority under which and in pursuance of which they were issued, and are bound at their peril to know that the mode prescribed for the issuance of valid municipal bonds was in fact valid in the issuance of the bonds in which they are dealing, and they are not permitted to rely even upon the recitals contained in the bonds, and that want of authority in municipal officers cannot be supplied by their unauthorized acts or representations, and that, in this case, as the findings show, there was no authority to make this refunding issue, and the indebtedness proposed to be refunded was not a valid city indebtedness evidenced by its bonds or warrants, and the election was not legally held ac-

cording to statute, and the bonds were not sold and issued in the mode prescribed by the statute, no recitals in the bonds and
564 no decision or determination by the city officials could give validity to the issue or estop the city from setting up, even as against *bona fide* purchasers, the invalidity of the bonds, and, by the laws of California, every person dealing in such municipal bonds is bound at his peril to inquire whether they were issued in the mode prescribed, and, as the mode is the measure of the power, the bonds are void in the hands of a holder for value without actual notice; and by the law of California the officers authorized to issue these bonds upon the conditions prescribed in the statute were not the appointed tribunal to decide the fact which constitutes the condition, and, consequently, their recitals will not be accepted as a substitute for proof.

That by the law of the State of California, municipal bonds are assignable contracts merely and subject in the hands of holders to all the equities existing in favor of the municipality issuing such contracts; that there is no constitutional or statutory authority in the State of California conferred upon the officers of municipalities to make such recitals as those contained in these bonds; that those officials have given them by statute simply power to do certain acts and make those acts matters of public record as required by law; having done so, their functions with respect to them and their legal effect cease. They have no power to determine the result of any special election on the question of issuing bonds or contracting indebtedness. They were not authorized to bind the city of Santa Cruz by any statement which they might make concerning such election or concerning the result of such election, nor to determine whether such election was duly or legally called, or held, or conducted, nor to determine whether notice of such election was duly or legally given
565 or published as required by law, nor had they any power to certify or declare that all or any of the acts, conditions or things required by law to be done precedent to the issue of the bonds in question, or of any bonds, were properly done, or properly happened, or were properly performed in legal or due form as required by law. These recitals, being neither authorized by law nor matters within the power of determination of the city officials, the city is neither concluded nor estopped in any manner by such recitals.

Therefore, the said The City of Santa Cruz, plaintiff in error, prays that the judgment of the circuit court of the United States in and for the ninth circuit, northern district of California, be reversed, and that said circuit court be directed to grant a new trial herein.

Dated December 28, 1898.

LINDSAY & CASSIN,
JAMES G. MAGUIRE,
JOHN GARBER,
Attorneys for Plaintiff in Error,
Defendant in the Lower Court.

566 In the Circuit Court of the United States in and for the Ninth Circuit, Northern District of California.

ALBERT H. WAITE, Plaintiff,
vs.
THE CITY OF SANTA CRUZ (a Corporation), Defendant.

Order Allowing Writ of Error.

The City of Santa Cruz (a corporation), defendant in the above-entitled action, having filed in the circuit court of the United States in and for the ninth circuit, northern district of California, its petition for a writ of error from the judgment entered therein on the twenty-ninth day of September, 1898, pursuant to the decision of the court therein rendered, having filed its assignment of errors,

It is ordered, that said writ of error do issue in the form of law according to the statute in such case made and provided.

Dated December 28, 1898.

JOHN J. DE HAVEN, *Judge.*

567 In the Circuit Court of the United States in and for the Ninth Circuit, Northern District of California.

ALBERT H. WAITE, Plaintiff,
vs.
THE CITY OF SANTA CRUZ (a Corporation), Defendant.

Order Fixing Amount of Bond on Writ of Error.

At a stated term, to wit: the November term, A. D. 1898, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court-room in the city and county of San Francisco on the twenty-eighth day of December, 1898.

Present: The Honorable J. J. De Haven, U. S. district judge, sitting as circuit judge.

On motion of Lindsay & Cassin and James G. Maguire, attorneys for defendant above named, it is ordered, that the bond for costs on writ of error taken by the defendant above named from the judgment rendered in the above-entitled action in favor of plaintiff in the circuit court of the United States in and for the northern district of California to the United States circuit court of appeals in and for the ninth circuit be, and the same is hereby fixed at the sum of five hundred dollars ($500).

Dated December 28, 1898.

JOHN J. DE HAVEN, *Judge.*

568 (Endorsed:) Petition for writ of error, assignment of errors, order allowing writ of error, and order fixing amount of bond. Filed December 28, 1898. Southard Hoffman, clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

ALBERT H. WAITE, Defendant,
vs.
THE CITY OF SANTA CRUZ (a Corporation), Plaintiff. } No. 12094.

Bond on Writ of Error.

Know all men by these presents, that we The City of Santa Cruz as principal, and Duncan McPherson and Michael Leonard as sureties, are held and firmly bound unto the above-named plaintiff, Albert H. Waite, in the full and just sum of five hundred dollars, to be paid to the said plaintiff, Albert H. Waite, his attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-ninth day of December in the year of our Lord one thousand eight hundred and ninety-one.

Whereas, lately at a session of the circuit court of the United
569 States, for the northern district of California, in a suit depending in said court, between Albert H. Waite, plaintiff, and The City of Santa Cruz, a corporation, defendant, judgment was rendered against the said defendant, and the said defendant, having obtained from said court a writ of error, to reverse the said judgment, in the aforesaid court, and a citation, directing to the said plaintiff, Albert H. Waite (defendant in error), is about to be issued citing and admonishing him to be and appear at a United States circuit court of appeals for the ninth circuit, to be holden at San Francisco, in the State of California, on the thirty-first day of December, next.

Now the condition of the above obligation is such, that if the said plaintiff in error, The City of Santa Cruz (defendant), shall prosecute its said writ of error to effect, and shall answer all damages and costs that shall be awarded against *them*, if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[Seal of the City of Santa Cruz.]

THE CITY OF SANTA CRUZ,
By WILLIAM H. LAMB, *Mayor.*

Attest: J. L. WRIGHT, *City Clerk.* [SEAL.]
DUNCAN McPHERSON. [SEAL.]
MICHAEL LEONARD. [SEAL.]

UNITED STATES OF AMERICA, }
Northern District of California, County of Santa Cruz, } ss:

Duncan McPherson and Michael Leonard being duly sworn, each for himself, deposes and says, that he is a householder in
570 said district, and is worth the sum of five hundred dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

DUNCAN McPHERSON.
MICHAEL LEONARD.

Subscribed and sworn to before me this twenty-ninth day of December, A. D. 1898.

L. J. DAKE,
Notary Public in and for the County of Santa Cruz, State of California.
[SEAL.]

(Endorsed:) Form of bond and sufficiency of securities approved. Wm. W. Morrow, judge. Filed December 30, 1898. Southard Hoffman, clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

ALBERT H. WAITE, Plaintiff, }
vs. } No. 12094.
THE CITY OF SANTA CRUZ, Defendant. }

Clerk's Certificate to Record.

I, Southard Hoffman, clerk of the circuit court of the United States of America, of the ninth judicial circuit, in and for the
571 northern district of California, do hereby certify the foregoing pages, numbered from one to five hundred and seventy-two, inclusive, to be a full, true, and correct copy of the record and of the proceedings in the above and therein entitled cause (excepting therefrom the original complaint and demurrer thereto, which, by stipulation of counsel and order of court are omitted from this record), and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $349.10, and that said amount was paid by the defendant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said circuit court, this thirty-first day of December, A. D. 1898.

SOUTHARD HOFFMAN,
[SEAL.] *Clerk United States Circuit Court, Ninth Judicial Circuit, Northern District of California.*

[Canceled 10-ct. internal-revenue stamp.]

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the ninth circuit, northern district of California, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between The City of Santa Cruz (a corpo-
572 ration), plaintiff in error, and Albert H. Waite, defendant in error, a manifest error hath happened, to the great damage of the said The City of Santa Cruz (a corporation), plaintiff in error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the ninth circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the thirty-first day of December next, in the said circuit court of appeals to be then and there held, that, the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the thirtieth day of December, in the year of our Lord one thousand eight hundred and ninety-eight.

SOUTHARD HOFFMAN,

[SEAL.] *Clerk of the Circuit Court of the United States for the Ninth Circuit, Northern District of California.*

573 Allowed by—

JOHN J. DE HAVEN, *Judge.*

(Endorsed:) Original. No. 12094. Circuit court of the United States, ninth circuit, northern district of California. The City of Santa Cruz, plaintiff in error, *vs.* Albert H. Waite, defendant in error. Writ of error. Service of within writ and receipt of a copy thereof is hereby admitted this thirtieth day of December, 1898. Chickering, Thomas & Gregory, attorneys for Albert H. Waite, defendant in error and plaintiff in action in circuit court.

Answer of the Judges.

The answer of the judges of the circuit court of the United States of the ninth judicial circuit in and for the northern district of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court, to the United States circuit court of appeals, for the ninth circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the court:

[SEAL.] SOUTHARD HOFFMAN, *Clerk.*

Filed December 30, 1898.

SOUTHARD HOFFMAN, *Clerk,*
By W. B. BEAIZLEY, *Deputy Clerk.*

574 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Albert H. Waite, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals, for the ninth circuit, to be holden at the city of San Francisco, in the State of California, on the thirty-first day of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, ninth circuit, northern district of California, in a certain action numbered 12094, wherein The City of Santa Cruz (a corporation), is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John J. De Haven, United States district judge, ninth circuit, northern district of California, this thirtieth day of December, A. D. 1898.

JOHN J. DE HAVEN, *Judge.*

(Endorsed:) Original. No. 12094. Circuit court of the United States, ninth circuit, northern district of California. The City of Santa Cruz, plaintiff in error, *vs.* Albert H. Waite. Citation.
575 Service of within citation and receipt of a copy thereof is hereby admitted this thirtieth day of December, 1898. Chickering, Thomas & Gregory, attorneys for Albert H. Waite, defendant in error and plaintiff in action in circuit court. Filed December 30, 1898. Southard Hoffman, clerk, by W. B. Beaizley, deputy clerk.

(Endorsed:) No. 505. In the United States circuit court of appeals for the ninth circuit. City of Santa Cruz, plaintiff in error, *vs.* Albert H. Waite, defendant in error. Transcript of record. In error to the circuit court of the United States for the northern district of California. Dated December 31, 1898. Frank D. Monckton, clerk, by Meredith Sawyer, deputy clerk.

576 At a stated term, to wit, the October term, A. D. 1898, of the United States circuit court of appeals, for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Thursday, the eighteenth day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

Present: The Honorable William B. Gilbert, circuit judge; Honorable Erskine M. Ross, circuit judge; Honorable Thomas P. Hawley, district judge.

THE CITY OF SANTA CRUZ *vs.* ALBERT H. WAITE. } No. 505.

Order of Argument (U. S. C. C. A.).

On motion on behalf of Frank J. Sullivan, Esquire, ordered said Frank J. Sullivan, Esquire, — allowed to file brief as *amicus curiæ* herein within fifteen days from date. Further ordered cause argued by James G. Maguire, Esquire, for plaintiff in error, and continued to tomorrow for further argument.

At a stated term, to wit, the October term, A. D. 1898, of the United States circuit court of appeals, for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Friday, the nineteenth day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

Present: The Honorable William B. Gilbert, circuit judge; Honorable Erskine M. Ross, circuit judge; Honorable Thomas P. Hawley, district judge.

577 THE CITY OF SANTA CRUZ *vs.* ALBERT H. WAITE. } No. 505.

Order of Submission (U. S. C. C. A.).

Ordered cause further argued by William Thomas, Esquire, counsel for defendant in error, and John Garber, Esquire, counsel for plaintiff in error, and submitted to the court for consideration and decision.

In the United States Circuit Court of Appeals for the Ninth Circuit.

THE CITY OF SANTA CRUZ, Plaintiff in Error,
vs.
ALBERT H. WAITE, Defendant in Error.

In error to the circuit court of the United States for the northern district of California.

Before Gilbert and Ross, circuit judges, and Hawley, district judge.

(*Opinion U. S. C. C. A.*)

Ross, circuit judge, delivered the opinion of the court:

The constitution of California provides for the classification of municipal corporations. The plaintiff in error, defendant
578 in the court below, is, and was at all the times mentioned in the record, a municipal corporation of the fifth class, organized and existing under and by virtue of a statute of the State of California, approved March 31, 1866 (Stat. 1866, p. 547), entitled "An act to incorporate the town of Santa Cruz," and an act supplemental thereto, approved March 11, 1876, entitled "An act to reincorporate the city of Santa Cruz." (Stat. 1876, p. 189.)

The present is an action at law to recover the amount alleged to be due on nine refunding bonds, and 282 interest coupons attached to the same, and to other refunding bonds, alleged to have been issued by the city of Santa Cruz on the 16th day of April, 1894, under and by virtue of an act of the State of California, approved March 1, 1893, and entitled "An act to amend an act entitled 'An act to authorize the common council, board of trustees, or other governing body of any incorporated city or town, other than cities of the first class, to refund its indebtedness, issue bonds therefor, and provide for the payment of the same,' approved March 15, 1883." (Stat. 1893, p. 59.) While the suit directly involves only the amount alleged to be due upon the bonds and coupons mentioned, it necessarily involves the validity of the entire issue under that act, consisting of 360 bonds, of one thousand dollars each, purporting to have been issued at the same time. It appears from the findings of the court below that on February 26, 1894, the city of Santa Cruz had an outstanding bonded indebtedness of $271,000.00 or thereabouts, and was also the owner of certain water works, and necessary appurtenances thereto, including
579 land, water rights, etc., theretofore purchased by it from the City Water Company of Santa Cruz, a private corporation. The water works and appurtenant property were subject to a mortgage which had been placed thereon by the City Water Company of Santa Cruz for the purpose of securing an outstanding bonded indebtedness of that corporation in the sum of $89,000.00, and interest thereon. On the said 26th day of February, 1894, the common council of the city, deeming it for the best interests of the city to refund its bonded indebtedness under the provisions of the act of

March 1, 1893, adopted an ordinance, which was fully approved by the mayor, providing for a special election to be held in the city of Santa Cruz on the 13th day of March, 1894, at which there should be submitted to its qualified electors the question of refunding the outstanding bonded indebtedness of the city. The indebtedness which it was thus proposed to refund was described in the ordinance as consisting not only of certain bonds of the city, amounting to the sum of $271,000.00, but also "eighty-nine (89) first-mortgage bonds (with interest thereon from November 1, 1893) of the corporation, the City Water Company of Santa Cruz, heretofore issued by said corporation, the City Water Company of Santa Cruz, which bonds bear date May 1, 1890, and are of the denomination of one thousand (1,000) dollars each, and bear interest at the rate of six (6) per cent. per annum, payable semi-annually, and are secured by a mortgage or deed of trust upon the property known as the city water works of Santa Cruz, executed by the City Water Company of Santa
580 Cruz, as party of the first part therein, to the Holland Trust Company of New York, as trustee, party of the second part therein; and which said bonds outstanding were, at the time of the conveyance by the City Water Company of Santa Cruz to the city of Santa Cruz of the property known as the city water works, and now are, a valid lien and charge upon the said property known as the city water works, and became thereby a part of the bonded indebtedness of the city of Santa Cruz"

More than two-thirds of the qualified electors of the city voted at the special election thus called in favor of the proposition to refund the then outstanding bonded indebtedness, as described in the ordinance, and thereafter, to wit, on March 26, 1894, the common council of the city passed, and its mayor approved, an ordinance for the purpose of carrying into effect the will of the electors as expressed at the election. This ordinance provided for the issuance of 360 interest-bearing bonds of the city, of the denomination of one thousand dollars each, and also directed that said bonds should be signed by the mayor and city clerk, and should contain the following recitals:

"This bond is one of a series of bonds of like date, tenor, and effect, issued by the said city of Santa Cruz for the purpose of refunding the bonded indebtedness of said city, and issuing bonds therefor, and providing for the payment of the same under and in pursuance of, and in conformity with, the provisions of an act of the legislature of the State of California, — 'An act to amend an act
581 entitled "An act authorizing the common council, board of trustees, or other governing body of any incorporated city or town, other than cities of the first class, to refund its indebtedness, issue bonds therefor, and provide for the payment of the same" (approved March 15, 1883), approved March 1, 1893.' And in pursuance of, and in conformity with, the constitution of the State of California, and the ordinances of the city of Santa Cruz, and in pursuance of, and in conformity with, a vote of more than two-thirds of all the qualified electors of said city of Santa Cruz, voting at a special election duly and legally called and held, and conducted in said city as

provided under said act, on Tuesday, the thirteenth day of March, 1894, notice thereof having been duly and legally given and published in the manner as required by law, and after the result of said election had been fully canvassed, found, and declared, in the manner and as required by law, and it is hereby certified and declared that all acts, conditions, and things required by law to be done precedent to and in the issue of said bonds, have been properly done, happened, and performed, in legal and due form, and as required by law."

The ordinance further directed that such bonds should, after public notice inviting bids therefor, be sold to the highest bidder for not less than their face value, in United States gold coin, to be paid on delivery at the city treasurer's office in the city of Santa Cruz. The bonds were offered for sale, but there were no bidders for them; and on April 16, 1894, the date to which the common council of the city had regularly adjourned, there were present Wm. T. Jeter, assuming to act as mayor, and J. Howard Bailey, F. J. Hoffman, E. G. Green, and F. W. Lucas, assuming to act as the common council of the city. At this meeting a proposition, theretofore made by the firm of Coffin & Stanton, to take all of the bonds, was accepted, upon condition that satisfactory security for its faithful performance by Coffin & Stanton be furnished. This proposition was dated February 27, 1894 (the day after the adoption of the ordinance calling the election), and was in substance one by which Coffin & Stanton were to purchase the refunding bonds at par value, less three per cent., without the payment of any money at the time of their delivery, or giving any other consideration therefor than their promise to take up the outstanding bonds which were to be refunded, and forward the same "from time to time to the city for cancellation."

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On April 23, 1894, the said Jeter, assuming to act as mayor, and the said Bailey, Hoffman, Green, and Lucas, assuming to act as the common council of the city, publicly met, pursuant to adjournment, and without protest from any one, accepted and approved a bond presented by Coffin & Stanton, for the faithful performance by them of the agreement contained in the proposition mentioned, and thereupon directed the city clerk of the city to deliver to that firm the entire issue of the refunding bonds referred to. The bonds were, in accordance with this direction, delivered to Walter Stanton, of the firm of Coffin & Stanton, on April 24, 1894, and thereafter Coffin & Stanton sold the same to various parties, from some of whom the plaintiff below, defendant in error here, claims title to the bonds and coupons sued on.

583

The plaintiff is only the nominal owner of these bonds and coupons, the same having been assigned to him for the purpose of collection only. Coffin & Stanton never complied, in whole or in part, with the agreement under which the bonds were delivered to them, and the city of Santa Cruz never received any benefit whatever from their sale, the entire proceeds thereof having been appropriated by Coffin & Stanton, who are insolvent.

The bonds are under the seal of the defendant city, contain the recitals set out, and are signed:

"WM. T. JETER,
Mayor of the City of Santa Cruz.

Attest: O. J. LINCOLN, *City Clerk.*"

They were so signed on the 16th day of April, 1894, on which day Jeter's successor to the office of mayor duly qualified.

The court below held, and rightly held, that the act of March 1, 1893, afforded no authority for the issuance by the city of Santa Cruz of any bonds for the purpose of refunding the indebtedness of the City Water Company, which was a private corporation. The court further held that as the bonds issued by the city under that act for that purpose were in no way segregated from others of the same issue, the plaintiff could only be permitted to recover by sustaining his contention that he was a *bona fide* purchaser without notice of this infirmity in the bonds, and as such was protected by the recitals contained therein. This contention the court below sustained, and accordingly gave judgment for the plaintiff.

584 The Federal courts have always protected with a firm hand the rights of *bona fide* creditors of municipal corporations, uniformly holding that the bonds issued by such corporations under granted power, negotiable in form, are valid in the hands of a *bona fide* holder, notwithstanding irregularities in their issue, or even in the non-performance of prior conditions, where the determination of the facts of such performance are by the law left to the determination of the municipal officers, and they incorporate in the bonds which are put upon the market proper recitals of such performance. The obvious reason for this is, that where the law under which such securities are authorized to be issued commits to the municipal representatives the determination of the conditions precedent, and those representatives recite upon the face of the bonds such performance, common honesty demands that the municipality be estopped to deny the truth of the recitals as against the *bona fide* purchaser of the bonds. But it is equally well settled that where the power to issue such bonds did not exist, or where the law under which they are issued requires certain facts to be made a matter of record, open to the inspection of every one, there can be no implication that it was intended to leave such facts to be determined by the officers charged with the duty of issuing the bonds and conclude by their recitals, contrary to the facts so recorded. (Sutliff *vs.* Lake County Commissioners, 147 U. S., 230; Dixon County *vs.* Field, 111 U. S., 83.)

585 It is, as a matter of course, not denied that every purchaser of a municipal bond is charged with notice of the law under and by virtue of which it is issued. In the present case that law is found in the statute of March 1, 1893 (Stat. 1893, p. 59), the first and second sections of which are as follows:

"SECTION 1. That whenever any incorporated city or town, other than cities of the first class, in this State, has an outstanding indebtedness, evidenced by bonds and warrants thereof, the common council, board of trustees, or other governing body thereof shall

have power to submit to the qualified electors of such city or town, at an election to be held for that purpose, the question of refunding such indebtedness. Said election shall be called and held in the same manner in which other elections are held in such city or town. The notice of such election shall recite the indebtedness to be refunded, together with the denomination, character, time of payment, rate of interest, as well as all other details of the bonds proposed to be issued. Such bonds shall be of the character known as 'serials,' one-fortieth of the principal being payable each year, together with interest due on all sums unpaid. Said bonds may be issued in denominations not to exceed one thousand dollars, nor less than one hundred dollars; principal and interest being payable in gold coin or lawful money of the United States, and either at the office of treasurer of such city or town, or at a designated bank situated in the cities of San Francisco, New York, Boston, or Chicago. Interest upon the same shall not exceed six per cent. per annum, and may be payable semi-annually. Said bonds shall *not*
be sold in the manner provided by such city council, or other
586 governing body, to the highest bidder, for not less than their
face value, in the same character of money in which they were payable. The proceeds of such sale shall be placed in the treasury to the credit of the funding fund, and shall be applied only for the purpose of refunding the indebtedness for which they have been issued. Said common council, or other governing body, shall, at the time of fixing the general tax levy for each year, and in the same manner for such tax levy provided, levy and collect annually, each year, sufficient money to pay one-fortieth part of the principal of such bonds, and also the annual interest upon the portion remaining unpaid.

"SECTION 2. Whenever sufficient money is in the funding fund, in the hands of the treasurer, to redeem one or more of the outstanding bonds proposed to be refunded, he shall publish once a week for two weeks in some newspaper of general circulation published in such city or town, if there be any, a notice to the effect that he is prepared to pay such bond or bonds (giving the number thereof), and if the same are not presented for redemption within thirty days after the first publication of such notice, the interest on such bonds will cease. He shall, at the same time, deposit in the post-office a copy of such notice, inclosed in a sealed envelope, with the postage paid thereon, addressed to the owner or owners of such bond or bonds, at the post-office address of such owner or owners, as shown by the record thereof kept in the treasurer's office. If such bond or bonds are not presented within the time specified in such notice, the interest thereon shall then cease, and the amount due be set aside for the payment of the same, whenever presented.

587 "All redemption of bonds shall be made according to the
priority in the order of their issuance, beginning at the first number. Whenever such outstanding bonds are surrendered and paid, the treasurer shall proceed to cancel the same by indorsing on the face thereof the amount for which they were received, the word

'canceled,' and the date of cancellation. He shall also keep a record of such bonds so redeemed, and shall make a report of the same to the common council, or other governing body of such city of town, at least once a month, accompanying the same therewith by the bonds which have been taken up and canceled."

It will be noticed that there is in this act no express grant of power on the part of the municipal authorities to issue any bonds. There is an implied power; but the implication is, not to issue bonds for any and all purposes, but refunding bonds with which to take up the outstanding bonds and warrants of the city, provided a majority of the qualified electors of the city should so vote, upon the submission of the question to them in the mode prescribed by the act. Whether the then outstanding indebtedness of the city should be refunded or not, was not left to the determination of the municipal authorities, but they were by the statute empowered to submit that question to a vote of the qualified electors of the city, specifying in the notice of election the indebtedness to be refunded, together with all details of the proposed issue. The power thus conferred on the mayor and council could only be exercised at a meeting of the municipal board. Such bodies can only act
588 by order, ordinance, or resolution, as every one is bound to know. (Wesson *vs.* Saline, 73 Fed. Rep., 919; 15 Am. & Eng. Ency. of Law, pp. 1028, 1029, 1030, and cases there cited.) In the present instance, the action of the mayor and council was by ordinance, as appears from the findings of the court below. Such ordinance was a part of the public records of the city, which by its charter are required to be kept "in large, well bound, uniform, and suitable books." (Stat. 1875–1876, p. 203.)

The indebtedness of the city, thus evidenced by its outstanding bonds and warrants, and proposed to be refunded by the issuance of other bonds, the act of March 1, 1893, authorized the mayor and common council of the city to specify, together with the details of the proposed issue, and submit the question of refunding the specified indebtedness, upon the designated terms, to the qualified electors of the city for determination. In the event the majority of the votes should be in favor of the proposition, then the municipal authorities were impliedly empowered to issue refunding bonds therefor, but for no other purpose. The public record which the act of March 1, 1893, taken and read, as it must be, in connection with the charter of the city, required to be made by order, ordinance, or resolution, disclosed to all the world the specific indebtedness that it was proposed by the municipal authorities to refund, and in respect to which the qualified electors of the city were called upon to vote. The officers impliedly charged with the issue of such refunding bonds were not in any manner authorized to make any certificate or representation to prospective purchasers
589 in respect to the character of the indebtedness evidenced by outstanding bonds or warrants of the city in lieu of which the refunding bonds were authorized to be issued. On the contrary, the statute itself was clear notice to every person that upon the records of the governing body of the city was required to be entered the spe-

cific indebtedness proposed to be refunded, together with the details of the proposed issue of refunding bonds, and that it was only for such specified indebtedness that any refunding bonds could be issued. To that record every purchaser was referred by the very act under which alone the bonds in suit were issued. The notice of election directed by this act to be prescribed by the mayor and common council of the city, occupies substantially the same position that the resolution did in the case of Lehman *vs.* City of San Diego, which was lately before this court, and is reported in 83 Fed. Rep., 669.

The present case is, we think, clearly within the doctrine of that case, and of Sutliff *vs.* Lake County Commissioners, *supra*, and Dixon County *vs.* Field, *supra*, and kindred cases, and must be ruled by them.

Entertaining these views, it is not necessary to decide any other point made and argued by counsel, except that as to the jurisdiction of the court. We have no doubt of the existence of jurisdiction.

In support of the point made on behalf of the plaintiff in error against it, it is argued that the action is substantially a proceeding in the nature of an application for a writ of mandamus to compel the officers of the city to perform the duty of levying and col-
590 lecting the necessary taxes for the payment of the bonds, which, without the issuance of such writ, and judgment in favor of the plaintiff, could not be enforced.

The action is one at law, upon certain bonds and coupons containing a promise on the part of the defendant to the suit "to pay to the bearer, for value received," so many dollars. The amount in controversy exceeds two thousand dollars, and the requisite diverse citizenship is alleged, and found to exist.

Conceding that, under the constitution and laws of California, the bonds and coupons sued on could only be paid out of the special fund provided for by the act under which they were issued, if the acts and bonds be valid—questions raised and contested in the suit—no presumption can be indulged that there are no moneys in the fund provided for. On the contrary, if the act be valid, the presumption is the other way, to wit, that the taxes provided for were levied by the officers charged with the duty of levying them, and that the moneys so raised were in the fund. It was not, therefore, as argued by counsel for the plaintiff in error, necessary that the complaint should show the levy of such taxes and the existence of moneys in the special fund. In such cases, where the plaintiff recovers, and there are no moneys in the fund out of which an execution issued upon the judgment can be satisfied, and this because of the refusal of the proper officers to levy the taxes, the Federal courts will issue a writ of mandamus in aid of its already-acquired juris-
diction. This is quite distinct from an original proceeding
591 for the issuance of a writ of mandamus, which it is well settled cannot be maintained in the Federal courts (Heine *vs.* Levee Commissioners, 19 Wall., 655; Bath County *vs.* Amy, 13 Wall., 244; Knox County *vs.* Aspinwall, 24 How., 376; Van Hoffman *vs.* City of Quincy, 4 Wall., 535; Riggs *vs.* Johnston County, 6 Wall., 166; Walkley *vs.* City of Muscatine, 6 Wall., 481; Commissioners

of Kearney County *vs.* McMaster, 68 Fed. Rep., 177; Keene Savings Bank *vs.* Lyon, 90 Fed. Rep., 523; Wilson *vs.* Knox County, 43 Fed. Rep., 481; Shepard *vs.* Tulare Irr. Dist., — Fed. Rep., p. —).

The judgment is reversed, and cause remanded to the court below, with directions to enter judgment for the defendant on the findings.

(Endorsed:) Opinion. Filed Dec. 4, 1899. F. D. Monckton, clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

CITY OF SANTA CRUZ, Plaintiff in Error,
vs.
ALBERT H. WAITE, Defendant in Error.

Dissenting Opinion (*U. S. C. C. A.*).

GILBERT, circuit judge, dissenting:

I am unable to agree with the majority of the court in holding that the city of Santa Cruz is not estopped to dispute the
592 validity of its bonds. The outstanding indebtedness which, under the authority of the act of March 1st, 1893, the city attempted to refund comprised a bonded indebtedness of the city amounting to $271,000.00, and a liability for $89,000.00 upon the first-mortgage bonds of the City Water Company of Santa Cruz which has been issued by that company before the purchase of its property by the city, and the payment of which had been assumed by the city. The power to refund the city's own bonded indebtedness was clearly within the letter and the spirit of the act. The $89,000.00 of the first-mortgage bonds of the water company, while it represented an outstanding indebtedness of the city for which it was liable and for the payment of which it might have borrowed money under proper proceedings therefor, and the refunding of which was within the spirit of the provisions of the act, was, nevertheless, not evidenced by the city's "bonds and warrants," and was therefore not within the letter of the law. To that extent the proposed application of funds which were to be realized upon the sale of the refunding bonds was illegal. The case presented is not a case where either by the constitution or by the statute of the State the city lacked the power to refund its indebtedness. The invalidity of the refunding bonds resulted from the proposed misapplication of a portion of the proceeds thereof. The underlying principles which are involved must not be permitted to become obscured by reason of the fact that the city of Santa Cruz was by its agents defrauded of the proceeds of the refunding bonds and never in fact received any portion thereof. The real
593 question is, whether a city, after procuring money on its bonds, which were issued for an unlawful purpose, but which the city certified were issued for a purpose which was lawful and for which statutory authority existed, can deny its obligation as

against an innocent purchaser. The case comes precisely within the principles announced in Hackett *vs.* Ottawa, 99 U. S., 86. In that case the city of Ottawa contended that its bonds were void, for the reason that they had been issued for a loan which was not for a municipal purpose, but for a donation to a private corporation in nowise connected with or under the control of the city. In that case, as in this, the ordinances of the city disclosed the purpose for which it was proposed to borrow money upon the city's credit. The court said: "The bonds in suit, by their recital of the titles of the ordinances under which they were issued, in effect, assured the purchaser that they were to be used for municipal purposes, with the previous sanction, duly given, of a majority of the legal voters of the city. If he would have been bound, under some circumstances, to take notice, at his peril, of the provisions of the ordinances, he was relieved from any responsibility or duty in that regard by reason of the representation, upon the face of the bonds, that the ordinances under which they were issued were ordinances 'providing for a loan for municipal purposes.' Such a representation by the constituted authorities of the city, under its corporate seal, would naturally avert suspicion of bad faith upon their part, and induce the purchaser to omit an examination of the ordinances them-
594 selves. It was, substantially, a declaration by the city, with the consent of a majority of its legal voters, that purchasers need not examine the ordinances, since their title indicated a loan for municipal purposes. The city is, therefore, estopped, by its own representations, to say, as against a *bona fide* holder of the bonds, that they were not issued or used for municipal or corporate purposes."

In the present case the opinion of the majority of the court seems to have been influenced by the fact that by the charter of the city of Santa Cruz a public record of its ordinances is required to be kept in books accessible to the public, and by the further fact that the city officers who were impliedly authorized to issue the refunding bonds were not expressly empowered to make any certificate or representation to prospective purchasers in respect to the character of the indebtedness for the payment of which the refunding bonds were issued. As far as the first consideration is concerned, it is sufficient to say that the charters of all municipal corporations require similar public records of their proceedings, and that such was undoubtedly the case with the city of Ottawa; yet in Hackett *vs.* Ottawa the court deemed that fact immaterial to the question which was before it, held that a purchaser of bonds was not bound to inspect such records, and disposed of the case upon the general principles of estoppel applicable to all cases. Neither can any distinction between that case and the case at bar be predicated upon the fact that the act of March 1st, 1893, under which the refunding bonds of the city of Santa Cruz were issued con-
ferred no express power upon the officers of the city to
595 certify to any particular fact in connection with the proceedings on which the bonds were issued, or to make any recitals whatever upon the bonds. The proceedings were had under

a statute that not not only conferred authority to refund the bonded indebtedness but imposed a duty upon the city to determine whether the occasion had arisen to refund, and, if so, to determine wherein the bonded indebtedness consisted, and the nature and amount thereof. Under this authority the city determined that the water company's bonds were a portion of its bonded debt, and as such subject to be refunded. The officers of the city of Santa Cruz who executed the refunding bonds were the officers whose duty it was to issue them. Before doing so they were obliged to determine for themselves that the antecedent steps had been taken which were indispensable to the issuance thereof, and they were empowered by an ordinance of the city to recite upon the bonds the facts usually recited upon such instruments—the facts upon which a purchaser was authorized to proceed and on which he might rely as was done in the Ottawa case. The bonds were executed under the seal of the city and were signed by the mayor and the city clerk. These were the officers whose duty it was to sign such instruments. Said the court in The Town of Coloma *vs.* Eaves, 92 U. S., 484, 488: "At some time or other, it is to be ascertained whether the directions of the act have been followed; whether there was any popular vote; or whether a majority of the legal voters present at the election did, in fact, vote in favor of the subscription. The duty of ascertaining was plainly intended to be vested somewhere,
596 and once for all; and the only persons spoken of who have any duties to perform respecting the election, and action consequent upon it, are the town clerk and the supervisor or other executive officer of the city or town. It is a fair presumption, therefore, that the legislature intended that those officers, or one of them at least, should determine whether the requirements of the act prior to a subscription to the stock of a railroad company had been met." The bonds in question in the present case contain the recital that they were issued "for the purpose of refunding the bonded indebtednsss of said city," in pursuance of the act of March 1, 1893, "and in pursuance of, and in conformity with, the constitution of the State of California, and the ordinances of the city of Santa Cruz, and in pursuance of, and in conformity with, a vote of more than two-thirds of all the qualified electors of said city," etc., and contained the certificate "that all acts, conditions, and things required by law to be done precedent to, and in the issue of said bonds, have been properly done, happened and performed, in legal and due form, and as required by law." Here is a distinct certificate that the bond was issued for the purpose of refunding the bonded indebtedness of the city. This recital was expressly authorized by an ordinance of the city before the bonds were issued. It was a representation of fact and not of law. In that respect the case stands upon a ground entirely distinct from that which controlled decision in the cases which are relied upon by the majority of the court to sustain their conclusion in this case, viz., Dixon County *vs.* Field, 111 U. S., 83, and Sutliff *vs.* Lake County Commis-
597 sioners, 147 U. S., 230. In those cases there was absence of statutory authority for the issuance of the bonds. In Dixon

County *vs.* Field, it was ruled that under the constitution of Nebraska there must be authority of law by statute of the legislature for every issue of bonds in aid of a railroad or other internal improvement. In the absence of such statute it was held that bonds were issued without warrant of law. The court said: "All parties are equally bound to know the law; and a certificate reciting the actual facts, and that thereby the bonds were conformable to the law, when, judicially speaking, they are not, will not make them so, nor can it work an estoppel upon the county to claim the protection of the law." In Sutliff *vs.* Lake County Commissioners it was held that where the constitution and the statute of a State forbid a county to issue bonds to an amount such as will make its indebtedness exceed a certain proportion of the assessed valuation of its taxable property, and the statute provides that semi-annual statements showing the total amount of the county's debt shall be published and entered upon the public records of the county, a purchaser of a bond issued in excess of the constitutional and statutory limit is charged with the duty of examining the record; and the county is not estopped, by a recital in the bond, that all the provisions of the statute have been complied with. In both cases the question was one of the preliminary authority to take the initial step toward the issuance of the bonds. The question of the existence of that authority was referable to the constitution and the statutes, and in the Sutliff case to a public record which the
598 statute expressly required and to which it directed attention.

The fact is not overlooked that incidentally in the opinion in Dixon County *vs.* Field, it was said that "where the validity of the bonds depends upon an estoppel, claimed to arise upon the recitals of the instrument, the question being as to the existence of power to issue them, it is necessary to establish that the officers executing the bonds had lawful authority to make the recitals and to make them conclusive." What was meant by this language of the court is indicated by the decisions which are cited to sustain it. It was not meant that before such recitals might bind the corporation the statute must first in words have defined the powers of municipal officers to decide preliminary questions and have recited the language of the representations which the bonds might obtain. It was meant that wherever it might be inferred from statutory authority that the officers whose duty it was to execute such instruments were to determine for themselves for their own guidance that the preliminary steps had been taken, or that the conditions of fact existed upon which they might proceed, and that they were to act thereupon, their recital of those facts should be conclusive. Thus, in Marcy *vs.* Town of Oswego, 92 U. S., 638, cited by the court in Dixon County *vs.* Field, it was said that "where it may be gathered from the legislative enactment that the officers or persons designated to execute the bonds were invested with power to decide whether the contingency had happened, or whether the fact existed which was a necessary precedent to any subscription or issue of the bonds, their decision is final in a suit by the
599 *bona fide* holder of the bonds against the municipality, and a recital in the bonds that the requirements of the legislative

act have been complied with, is conclusive." Of similar import are the remarks of Mr. Justice Bradley, speaking for the court in County of Warren *vs.* Marcy, 97 U. S., 104, and the decision of the court in Oregon *vs.* Jennings, 119 U. S., 74, 92, in which it was held that by virtue of the statutory authority to the supervisor and the clerk of the town to sign the bonds it was implied that they were the persons intrusted with the duty to decide, before issuing the bonds, whether the conditions determined at the election existed. The ruling in Hackett *vs.* Ottawa has not been modified by any subsequent decision of the Supreme Court. It was expressly approved in Ottawa *vs.* National Bank, 105 U. S., 342, where it was held that *the purchaser of bonds was relieved from the duty of taking* notice of the provisions of ordinances whose titles were recited in the bonds "by reason of the representation upon the face of the bonds that the ordinances provided for a loan for municipal purposes." It was impliedly approved in Sherman County *vs.* Simons, 109 U. S., 737, and in Evansville *vs.* Dennett, 161 U. S., 434. In the latter case the bonds contained the recital that they were issued by virtue of a certain designated act of the legislature "as well as by virtue of a resolution of the city council, ordering an election of the qualified voters of the city, which resulted in a legal majority in favor of such subscription." The court said: "As, therefore, the recitals in the bonds import compliance with the city's charter, purchasers for value having no notice of the non-performance
600 of the conditions precedent were not bound to go behind the statute conferring the power to subscribe, and to ascertain, by an examination of the ordinances and records of the city council, whether those conditions had, in fact, been performed. With such recitals before them they had the right to assume that the circumstances existed which authorized the city to exercise the authority given by the legislature." In the United States circuit courts of appeals the same doctrine has been applied. In Risley *vs.* Village of Howell, 64 Fed., 453, the question arose whether a *bona fide* purchaser of bonds was chargeable with notice and defeated in his right to recover by the fact that an ordinance referred to in the bond, and mentioned as an ordinance of a certain date, misappropriated the bonds to an unlawful use. The court held that inasmuch as the common council had authority to issue bonds of the nature of those which were involved in the suit, the defendant was estopped from setting up the fraudulent conduct of its own officials in misapplying the proceeds thereof. In City of Huron *vs.* Second Ward Sav. Bank, 86 Fed., 272, the bonds in the controversy recited that they were issued for the purpose of refunding the "bonds, warrants, or floating debt" of the city. It was held that the corporation was estopped from defending an action by an innocent purchaser on the ground that the warrants or bonds which they were issued to satisfy were void, or that the debt which they were issued to pay was fictitious. In City of South St. Paul *vs.* Lamprecht Bros. Co., 88 Fed., 449, it was held that the issuance of bonds containing the recital that they were "authorized by" a certain act of the
601 legislature estops a municipality from tendering proof that

they were issued in the construction of a bridge, a portion of which was outside the corporate limits.

In County of Jasper *vs.* Ballou, 103 U. S., 752, it was said: "There must be a time when the people in their political capacity are concluded by their contracts as much as individuals, and we think that where the people of a county, at an election held according to law, authorize their corporate or political representatives to treat certain outstanding county obligations as 'properly authorized by law' for the purpose of negotiating a settlement with the holders, and the settlement which was contemplated has been made, all contests as to the validity of the obligations must be considered as ended." In the case at bar the city of Santa Cruz by its ordinance adopted at the institution of the proceedings on which the bonds were issued, by the election notice which was issued and published by the vote of its citizens at such election and by the recitals which its bonds contained, declared that the outstanding obligation of the city, which was evidenced by the water bonds which it had assumed to pay, was a portion of the city's bonded indebtedness which it might refund under the act. Through all the transactions culminating in the delivery of the bonds it is clear that the officers of the city acted in the utmost good faith. There was no fraud, misrepresentation, or concealment. They honestly believed the refunding of the bonds of the water company to be within the purview of the statute, and if they had ever received the proceeds of the refunding bonds
602 they would doubtless have applied them to the discharge of that obligation.

I submit that the city is estopped to deny its liability, and that the judgment of the circuit court should be affirmed.

(Endorsed:) Dissenting opinion. Filed Dec. 4, 1899. F. D. Monckton, clerk.

United States Circuit Court of Appeals for the Ninth Circuit, October Term, 1899.

THE CITY OF SANTA CRUZ (a Corporation), Plaintiff in Error,
vs.
ALBERT H. WAITE, Defendant in Error. } No. 505.

Judgment (*U. S. C. C. A.*).

In error to the circuit court of the United States for the northern district of California.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the northern district of California, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court in
603 this cause be, and the same is hereby, reversed with costs, and the cause is remanded to said circuit court, with directions to enter judgment for the defendant on the findings.

(Endorsed:) Judgment. Filed December 4, 1899. F. D. Monckton, clerk.

At a stated term, to wit, the October term, A. D. 1899, of the United States circuit court of appeals, for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Friday, the second day of March, in the year of our Lord one thousand nine hundred.

Present: The Honorable William B. Gilbert, circuit judge; Honorable Erskine M. Ross, circuit judge; Honorable Thomas P. Hawley, district judge.

THE CITY OF SANTA CRUZ
vs.
ALBERT H. WAITE. } No. 505.

Order Denying Petition for Rehearing, etc. (U. S. C. C. A.).

Ordered petition for a rehearing heretofore filed herein denied, and issuance of mandate herein stayed sixty days from date.

604 United States Circuit Court of Appeals for the Ninth Circuit.

THE CITY OF SANTA CRUZ (a Corporation), Plaintiff in Error,
vs.
ALBERT H. WAITE, Defendant in Error. } No. 505.

Certificate of Clerk C. A. A. to Transcript.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing six hundred and three pages, numbered from 1 to 603, inclusive, to be a copy of the entire record of the above-entitled case in said United States circuit court of appeals for the ninth circuit, as the original thereof remains and appears of record in my office.

Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 26th day of March, A. D. 1900.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

{ Ten-cent U. S. internal-revenue stamp, canceled M'ch 26, 1900. F. D. M. }

604½ [Endorsed:] File No., 17,712. U. S. C. C. of appeals, 9th circuit. Term No., 248. Albert H. Waite, petitioner, *vs.* The City of Santa Cruz. Filed April 11, 1900.

605 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the ninth circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which The City of Santa Cruz is plaintiff in error and Albert H. Waite is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the northern district of California, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court
606 of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 23d day of April, in the year of our Lord one thousand nine hundred.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

607 [Endorsed:] Docketed. (No. 505, U. S. C. C. A.) Supreme Court of the United States. No. 598. October term, 1899. Albert H. Waite *vs.* The City of Santa Cruz. Writ of certiorari. Filed May 7, 1900. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

608 In the United States Circuit Court of Appeals for the Ninth Circuit.

A. H. WAITE, Petitioner & Plaintiff in Error,
vs.
CITY OF SANTA CRUZ, Respondent & Defendant in Error. } No. 505.

Stipulation as to Return to the Writ of Certiorari.

It is this 5th day of May, A. D. 1900, stipulated by and between the attorneys of record for the parties in the above-entitled cause that the certified transcript of the record of said cause heretofore submitted to the Supreme Court of the United States with the petition for a writ of certiorari, may be filed in the said Supreme Court and may be received and considered by that court as the transcript of the record in said cause, as though the same had been returned

by the clerk of the circuit court of appeals for the ninth circuit in obedience to the writ of certiorari granted April 23rd, 1900.

DILLON & HUBBARD AND
CHICKERING, THOMAS & GREGORY,
Attorneys for Petitioner & Plaintiff in Error.
JAMES G. MAGUIRE,
JOHN GARBER,
CARL E. LINDSAY,
Attorneys for Respondent and Defendant in Error.

(Endorsed:) Stipulation as to return to the writ of certiorari. Filed May 7, 1900. F. D. Monckton, clerk.

609 United States Circuit Court of Appeals for the Ninth Circuit.

THE CITY OF SANTA CRUZ (a Corporation), Plaintiff in Error,
v.
ALBERT H. WAITE, Defendant in Error. } No. 505.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the next preceding page to be a full, true, and correct copy of a stipulation as to return to writ of certiorari filed in the above-entitled cause on the 7th day of May, 1900, as the original thereof remains of record in my office.

Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 9th day of May, A. D. 1900.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

{ Ten-cent U. S. internal-revenue stamp, canceled May 9, 1900. F. D. M. }

610 & 611 United States Circuit Court of Appeals for the Ninth Circuit.

THE CITY OF SANTA CRUZ (a Corporation), Plaintiff in Error,
v.
ALBERT H. WAITE, Defendant in Error. } No. 505.

Return to Writ of Certiorari.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, in obedience to the foregoing writ of certiorari, issued out of the Supreme Court of the United States and addressed to the honorable judges of the United States circuit court of appeals for the ninth circuit, commanding them to transmit to the said Supreme Court the record and proceedings in the above-entitled cause, do hereby attach to the said writ a certified copy of a

stipulation entered into between the attorneys for the several parties in said cause on the 5th day of May, A. D. 1900, the original of which stipulation has been heretofore filed in this court, and do make the same my return to said writ.

In testimony whereof I have hereunto set my hand and affixed the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 9th day of May, A. D. 1900.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk U. S. Circuit Court of Appeals
for the Ninth Circuit.

{Ten-cent U. S. internal-revenue stamp, canceled May 9, 1900. F. D. M.}

612 [Endorsed:] File No., 17,712. Supreme Court U. S., October term, 1900. Term No., 248. Albert H. Waite, petitioner, *vs.* The City of Santa Cruz. Writ of certiorari and return. Filed May 17, 1900.

Office Supreme Court U.S.
FILED
APR 11 1900
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 598 2448. 39

ALBERT H. WAITE,
Petitioner,

vs.

THE CITY OF SANTA CRUZ,
Respondent.

Petition to Supreme Court under the Act of March 3, 1891, for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Supreme Court of the United States:

YOUR PETITIONER, ALBERT H. WAITE, respectfully presents to this Court this his petition for a writ of *certiorari* addressed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court and the Clerk thereof to certify to this Court the record and proceedings in the case in said Court wherein the respondent, the said City of Santa Cruz, is plaintiff in error, and your peti-

tioner, the said Albert H. Waite, is the defendant in error, together with its opinion therein, for the review and determination of said case by this Court, as provided in Section 6 of the Act of Congress approved March 3, 1891.

Your petitioner states the facts in this behalf as follows: Your petitioner, Albert H. Waite, as plaintiff, began the said case by summons and complaint in an action at law on certain negotiable refunding bonds and coupons against the said City of Santa Cruz in the Circuit Court of the United States for the Northern District of California, and a judgment was, on or about September 29, 1898, rendered by said Court in said action in favor of the plaintiff, said Albert H. Waite. Thereupon the said City of Santa Cruz took the said case, on writ of error, to the United States Circuit Court of Appeals for the Ninth Circuit, and the said Circuit Court of Appeals, by a vote of two judges against one, reversed the judgment of said Circuit Court, and on December 4, 1899, entered judgment accordingly, directing the Circuit Court to enter judgment for defendant (Record, p. 602). On petition for rehearing being filed by the said Albert H. Waite, the said United States Circuit Court of Appeals adhered to its decision, and on March 2, 1900, denied said motion (Record, p. 603). Circuit Judge GILBERT dissented, and wrote a dissenting opinion, agreeing with the opinion and decision of the Circuit Court.

The printed transcript of record and of opinions in the said cause is herewith submitted to this Court. Your petitioner states that the said judgment of the United States Circuit Court of Appeals is contrary to law and directly contrary to the decisions of this Su-

preme Court, especially the case of *Hackett vs. Ottawa*, 99 U. S., 86, and the case of *Evansville vs. Dennett*, 161 U. S., 434 (unanimous decisions of this Court in which Mr. Justice HARLAN gave the opinions), as appears in the record in said case and in the brief on behalf of petitioner herewith submitted.

In addition to the grounds of review shown in the record and brief of the petitioner, the even division of opinion of the judges in the Ninth Circuit on the very point decisive of this case, and which relates, not to a mere question of local law or importance, but to a question of commercial law affecting vast interests in every State of the Union, renders this case eminently one in which a writ of *certiorari* should be granted.

Thus, as this case now stands, two judges, namely, Circuit Judge GILBERT and District Judge DE HAVEN, have given opinions in favor of the validity of the bonds and coupons in question, and two judges, namely, Circuit Judge Ross and District Judge HAWLEY, have given opinions against their validity. The judges in the ninth circuit, therefore, who have had to do with this case, have been evenly divided, two judges against two, on the precise question on which we ask this writ of *certiorari*.

This case, moreover, involves the large amount of $360,000 of bonds and interest thereon, owned by about twenty banks, trust companies and individuals, who paid full value therefor.

Wherefore, your petitioner prays that upon the grounds and reasons appearing in the record of said cause and in the brief in support of this petition, this Court issue such writ of *certiorari*, commanding said United States Circuit Court of Appeals and the clerk thereof to certify to this Court the record and pro-

ceedings in the said case in said Court, with its opinion therein, for the review and determination of said case by this Court, as provided in Section 6 of the Act of Congress of March 3, 1891, and your petitioner will ever pray.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
Attorneys for Petitioner.

W. H. CHICKERING,
M. C. SLOSS,
Of Counsel.

Supreme Court of the United States.

ALBERT H. WAITE,
Petitioner,

AGAINST

THE CITY OF SANTA CRUZ,
Respondent.

No. 598.

BRIEF ON BEHALF OF PETITIONER IN SUPPORT OF APPLICATION TO THIS COURT FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Statement of the Case.

This is an action at law brought on negotiable coupons of negotiable bonds, and also upon some of said bonds which had matured, issued by the defendant The City of Santa Cruz, California (Complaint, Record, p. 5). The case was tried before the Circuit Court without a jury, a stipulation in writing waiving a jury having been duly filed (Record, p. 33). The court found that the plaintiff was a *bona fide* holder of

the said bonds and coupons, he having acquired the same from *bona fide* purchasers thereof, who had paid value without any notice of any illegality or alleged illegality in regard to the same (Record, p. 44, Finding 12; and p. 34, Findings 1 and 2).*

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*The following banks, trust companies and individuals were, as shown by the evidence in the record (p. 173 *et seq.*), the *bona fide* purchasers of the said refunding bonds involved in the present case, and paid full value therefor, or loaned money in the usual course of business on the pledge of the said bonds as collateral security, to wit:

People's Trust Company, St. Albans, Vt., 1 bond, No. 297	$1,000
International Trust Company, Boston, Mass., 16 bonds, Nos. 10, 11, 12, 14, 91, 92, 93, 118-126 inclusive	16,000
Chapman National Bank, Portland, Me., 7 bonds, Nos. 245-251 inclusive	7,000
Wakefield Trust Company of Rhode Island, 1 bond, No. 21	1,000
National Bank of the Republic, Boston, Mass., 10 bonds, Nos. 109-117 inclusive and 72	10,000
E. G. & E. Wallace, N. H., 150 bonds, Nos. 1-8	150,000
First National Bank, Worcester, Mass., 22 bonds, Nos. 9, 13, 23, 100, 300, 301, 302, 303, 308, 309, 310, 311, 312, 325, 326, 327, 328, 343, 348, 349, 350, 351	22,000
First National Bank, Hagerstown, Md., 6 bonds, Nos.	6,000
Albany City National Bank, New York, 20 bonds, Nos. 233, 235-244 inclusive, 280-288 inclusive	20,000
First National Bank, New York, 6 bonds, Nos. 83-87 inclusive and 299	6,000
South Norwalk Savings Bank, Conn., 11 bonds, Nos. 25, 26, 95, 97, 98, 99, 154, 155, 158, 305, 306	11,000
Bank of Skaneateles, New York, 5 bonds, Nos. 102-106 inclusive	5,000
Farmers' National Bank, Mt. Holly, N. J., 4 bonds, Nos. 96, 156, 276, 313	4,000
Kenduskeag National Bank, Bangor, Me., 12 bonds, Nos. 136, 137, 138, 145, 147, 148, 149, 150, 151, 152, 153	12,000
National Bank of Waterville, New York, 1 bond, No. 360	1,000
First National Bank, Webster, Mass., 4 bonds, Nos. 22, 277, 278, 279	4,000
Martin's Bank, Ltd., London, 21 bonds, Nos. 64, 70, 82, 84, 85, 94, 95, 97, 122-124 inclusive, 184, 185, 186, 187, 188, 201-205 inclusive	21,000
Northern Counties Investment Trust, Ltd., England, 3 bonds Nos. 181, 182, 183	3,000

The Enabling Act.

The statute under which the said bonds were issued is as follows (Session Laws of California, 1893, p. 59):

"An Act to amend an Act entitled 'An Act to authorize the Common Council, Board of Trustees or other governing body of any incorporated city or town, other than cities of the first class, to refund its indebtedness, issue bonds therefor, and provide for the payment of the same,' approved March 15, 1883.

"*The People of the State of California, represented in Senate and Assembly, do enact as follows:*

"SECTION 1. That section one of the above-entitled Act is hereby amended to read as follows:

"SECTION 1. That whenever any incorporated city or town, other than cities of the first class, in this State, has *an outstanding indebtedness, evidenced by bonds and warrants thereof*, the common council, Board of Trustees, or other governing body thereof, shall have power to submit to the qualified electors of such city or town, at an election to be held for that purpose, the question of refunding such indebtedness. Said election shall be called and held in the same manner in which other elections are held in such city or town. The notice of such election shall recite the indebtedness to be refunded, together with the denomination, character, time of payment, rate of interest, as well as all other details of the bonds proposed to be issued. Such bonds shall be of the character known as 'serials' one fortieth of the principal being payable each year, together with interest due on all sums unpaid. Said bonds may be issued in denominations not to exceed One thousand dollars, nor less than One hundred dollars; principal and interest being payable in gold coin or lawful money of the United States, and either at the office of Treasurer of such city or town, or at a designated bank situated in the cities of San Francisco, New York, Boston, or Chicago. Interest upon the same shall not exceed six per cent per annum, and may be payable semi-annually. Said bonds shall be sold in the manner provided by such city council, or other governing body, to the highest bidder, for not less than their face value, in the same character of money in

which they were payable. The proceeds of such sale shall be placed in the Treasury to the credit of the funding fund, and shall be applied only for the purpose of refunding the indebtedness for which they have been issued. Said common council, or other governing body, shall, at the time of fixing the general tax levy for each year, and in the same manner for such tax levy provided, levy and collect annually, each year, sufficient money to pay one fortieth part of the principal of such bonds, and also the annual interest upon the portion remaining unpaid.

"SEC. 2. That section two of said Act be amended so as to read as follows:

"SEC. 2. Whenever sufficient money is in the funding fund, in the hands of the treasurer, to redeem one or more of the outstanding bonds proposed to be refunded, he shall publish once a week for two weeks in some newspaper of general circulation published in such city or town, if there be any, a notice to the effect that he is prepared to pay such bond or bonds (giving the number thereof) and if the same are not presented for redemption within thirty days after the first publication of such notice, the interest on such bonds will cease. He shall, at the same time, deposit in the Post Office a copy of such notice, inclosed in a sealed envelope with the postage paid thereon, addressed to the owner or owners of such bond or bonds at the Post Office address of such owner or owners, as shown by the record thereof kept in the Treasurer's office. If such bond or bonds are not presented within the time specified in such notice, the interest thereon shall then cease, and the amount due be set aside for the payment of the same, whenever presented. All redemption of bonds shall be made according to the priority in the order of their issuance, beginning at the first number. Whenever such outstanding bonds are surrendered and paid, the Treasurer shall proceed to cancel the same by indorsing on the face thereof the amount for which they are received, the word 'canceled', and the date of cancellation. He shall also keep a record of such bonds so redeemed, and shall make a report of the same to the common council, or other governing body of such city or town, at least once a month, accompanying the same therewith by the bonds which have been taken up and canceled.

"SEC. 3. That section three of said Act be amended so as to read as follows:

"SEC. 3. All moneys which shall remain in said funding fund after all outstanding bonds as were proposed to be refunded have been taken up and canceled, shall be paid into the General Fund of such city or town, and become a part thereof.

"SEC. 4. This Act shall take effect and be in force immediately after its passage."

Approved, March 1, 1893.

Note that this statute (sec. 1, *supra*) confers upon any incorporated city or town express power to refund "an outstanding indebtedness evidenced by bonds and warrants thereof." Note also that there is nothing peculiar in this enabling statute as to the mode of exercising the express power to refund the obligations of the municipality, or as to any record to be kept by the municipality; and observe also that there is no requirement in the statute that the purchasers shall be bound to take notice of the ordinances or records of the municipality relating to the issue of the refunding bonds, which bonds the statute contemplates shall be long-time negotiable securities, and placed upon the market and sold as such.

In all these respects this case presents only the usual and ordinary case of negotiable municipal bonds, and there is absolutely nothing peculiar in this case *except the decision and judgment of the Circuit Court of Appeals.*

Copy of Bond and Coupons Involved in Present Suit.

The refunding bonds and coupons involved in the present case are in the following form (Complaint, Record, pp. 8–11; and Findings of Court, Record, p. 34 *et seq.*).

" Number. Dollars.
" ---------- $1,000.
" United States of America. State of California.
" Bond of the City of Santa Cruz. Refunding Gold Bond.
" Five per cent. Series 1.

" The City of Santa Cruz, a municipal corporation, in the county of Santa Cruz, State of California, is indebted to and promises to pay to the bearer, for value received, the sum of one thousand dollars ($1,000), gold coin of the United States, on the fifteenth day of April, A. D. 1895, with interest thereon, in like gold coin, at the rate of five (5) per cent per annum, payable annually on the fifteenth day of April, of each calendar year from the date hereof, at the office of the city treasurer of said city of Santa Cruz, on presentation and surrender of the proper interest-bearing coupon hereto attached.

" And for the payment of the principal sum herein named, and the interest accruing thereon, the said city of Santa Cruz is held and firmly bound and its faith and its and credit and all the real and personal property of said city, are hereby pledged for the prompt payment of this bond and interest at maturity.

" This bond is one of a series of bonds of like date, tenor, and effect, issued by the said city of Santa Cruz, for the purpose of refunding the bonded indebtedness of said city and issuing bonds therefor, and providing for the payment of the same under and in pursuance of and in conformity with, the provisions of an act of the legislature of the State of California, entitled 'An act to amend an act entitled "An act authorizing the common council, board of trustees, or other governing body of any incorporated city or town, other than cities of the first class, to refund its indebtedness, issue bonds therefor, and provide for the payment of the same" (approved March 15, 1883),' approved March 1, 1893.

" And in pursuance of and in conformity with the Constitution of the State of California, and the ordinances of the city of Santa Cruz, and in pursuance of and in conformity with a vote of more than two-thirds of all the qualified electors of said city of Santa Cruz, voting at a special election duly and legally called and held and conducted in said city as provided under said

act, on Tuesday, the thirteenth day of March, 1894, notice thereof having been duly and legally given and published in the manner as required by law, and after the result of said election had been canvassed, found and declared in the manner and as required by law.

"And it is hereby certified and declared that all acts, conditions, and things required by law to be done precedent to and in the issue of said bonds, have been properly done, happened, and performed in legal and due form, as required by law. This bond ceases to bear interest when due, unless presented for payment.

"In testimony whereof, the said city of Santa Cruz, by its mayor and common council, has caused this bond to be signed by the mayor of said city of Santa Cruz, and attested by its said clerk, with the seal of said city attached, this sixteenth day of April, A. D. one thousand eight hundred and ninety-four.

[SEAL] WM. T. JETER.
" Mayor of the City of Santa Cruz.

" [Attest];
O. J. LINCOLN,
" City Clerk.

[ENDORSED]:

Number.....

" State of California. The City of Santa Cruz. 1000 dollars. Refunding five per cent Gold Bond.

" $1,000. $1,000.

" Series 1. Interest payable annually April 15. Principal due April 15, 1895.

" (Surcharged on face of bond) $1,000."

" $50. [COUPON]: $50.

" The city of Santa Cruz will pay to bearer hereof, on the fifteenth day of April, 1895, at the office of the city treasurer of said city, fifty dollars, gold coin of the United States, for interest on refunding bond issued sixteenth day of April, A. D. 1894.

" No.....

" WM. T. JETER,
" Mayor of the City of Santa Cruz.

" O. J. LINCOLN,
" City Clerk.

" [Surcharged *of* face of coupon]: 1."

Express Recital in Bond Fatal to the the Defense Held Good by the Circuit Court of Appeals.

Note that the bond expressly recites :

"This bond is one of a series of bonds of like date, tenor, and effect, issued by the said city of Santa Cruz, **for the purpose of refunding the bonded indebtedness of said city** and issuing bonds therefor, and providing for the payment of the same under and in pursuance of and in conformity with, the provisions of an act of the legislature of the State of California, entitled," &c. (reciting the title of the said act of 1893 above quoted).

The City's Defense.

It was alleged as a defense to these bonds (and this was the only ground on which the Circuit Court of Appeals held them invalid) that out of the $360,000 of old bonded indebtedness authorized to be refunded the sum of $89,000 was not technically bonded indebtedness of the city of Santa Cruz, but was bonded indebtedness of a water company, the plant of which, however, had been purchased by the city *subject to a mortgage securing the said $89,000 of bonds, which bonded indebtedness of $89,000 secured by said mortgage the city had upon its purchase assumed and agreed to pay*, and in its notice of election and in its ordinance calling the election for voting on the refunding bonds, declared "*became thereby a part of the bonded indebtedness of the City of Santa Cruz*" (Record, pp. 65, 129). The Circuit Court held that this defense would be good against a purchaser of these bonds who had notice—a proposition which we dispute (see Brief hereto annexed, pp. 53–61). The Circuit Court, however, rightly held that

this defense could not be made against the *bona fide* holders of the said refunding bonds. The Circuit Court said on this point in its opinion (Record, p. 104):

"It is next insisted by defendant that Wallace & Co. [the *bona fide* purchasers of the bonds and predecessors in title to the plaintiff Waite] must be deemed to have purchased such bonds with notice that they were issued in part to refund and take up the mortgage bonds of the private corporation, because each bond contained the recital that it was issued 'in pursuance of and in conformity with the Constitution of the State of California, and the ordinances of the city of Santa Cruz.'

"The proposition for which the defendant contends upon this point is, that by this general reference to the ordinances of the city, all purchasers were put upon inquiry as to the terms of the ordinances under which the bonds were issued; and that as it appears from these ordinances that a part of the refunding issue was to be used in refunding the mortgage bonds of the private corporation, all persons purchasing the bonds are to be charged with notice of this fact. I do not think this contention can be sustained, although it is apparently supported by the case of *Post v. Pulaski County*, 49 Fed. 629, cited by the counsel for defendant.*

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* The case cited, *Post v. Pulaski County*, has been expressly overruled by the very court which originally decided it, namely, the United States Circuit Court of Appeals for the Seventh Circuit. That court said in *Wesson v. County of Saline*, 73 Fed. Rep. 917, 919 (Mr. Justice HARLAN sitting at the hearing, but not participating in the decision):

"But the proposition enunciated in *Post v. Pulaski County*, that 'the recital in the bonds that they were issued pursuant to an order of the county court put whosoever should come into possession of those bonds, even if purchased for value in the open market, upon inquiry as to the terms of that order,' is inconsistent with, and must be regarded as overruled by the recent ruling of the Supreme Court in the case of *City of Evansville v. Dennett*, *supra*, where it was held that a recital that a subscription to the stock of a railroad company was 'made in pursuance of an act of the legislature and ordinances of the city council, passed in pursuance thereof, * * * imported not only compliance with the act of the legislature, but that the ordinances of the city council were in conformity with the statute."

The recital above quoted does not stand alone. In addition to and immediately preceding it, **the bonds under consideration expressly state that they were 'issued for the purpose of refunding the bonded indebtedness' of the city of Santa Cruz, and in conformity with the act of the legislature which they recite.** The further statement, that their issuance was also in conformity with the ordinances of the city of Santa Cruz, does not detract from or modify the effect of the prior recital concerning the purpose for which the bonds were issued, and certainly cannot be construed as a warning to purchasers to examine the ordinances and determine for themselves and at their peril whether the previous representation in relation to the purpose for which the bonds were issued was true or false. On the contrary, this general reference to the ordinances of the city of Santa Cruz must be read in connection with the other parts of the instrument in which it is found, and when this is done and all the recitals are given effect, it is at once seen that they import not only that the bonds were issued in conformity with the act of the legislature, 'but that the ordinances of the city council were in conformity with the statute.'

"*Evansville v. Dennett*, 161 U. S., 434. See, also, *Hackett v. Ottawa*, 99 U. S., 86; and the well considered case of *Risley v. Village of Howell*, 64 Fed. 453."

The Circuit Court accordingly rendered judgment in favor of the plaintiff (Record, p. 79).

Decision and Judgment in Circuit Court of Appeals.

The City of Santa Cruz took a writ of error to the Circuit Court of Appeals for the Ninth Circuit, and that court by a vote of two Judges against one dissenting Judge held that, nothwithstanding these recitals in the bonds, a *bona fide* purchaser of the same was put upon notice of the ordinances and records of proceedings of the city council of the city of Santa Cruz,

and on this ground alone held that the bonds were invalid, and reversed the decision of the Circuit Court (Record p. 602).

The court held, not merely $89,000 of the refunding bonds invalid, but the whole $360,000 invalid on account of the supposed defect that $89,000 old bonds refunded were technically not bonds of the city, although even these $89,000 bonds were really indebtedness of the city and bonded indebtedness. This is monstrous injustice (see Brief hereto attached, POINT II., pp. 53-61).

The decision of the Circuit Court was given by District Judge DE HAVEN (Record, p. 81), and the decision of the Circuit Court of Appeals was given by Circuit Judge ROSS (Record, p. 577), and concurred in by District Judge HAWLEY, but Circuit Judge GILBERT dissented (Record, p. 591).

As the case now stands, therefore, two of the Judges, a Circuit Judge and a District Judge, have given opinions one way on the question involved, and two other Judges, a Circuit Judge and a District Judge, have given precisely opposite opinions in the same circuit.

Circuit Judge Ross in his opinion in the Circuit Court of Appeals says (Record, p. 577 *et seq.*):

"The statute itself was clear notice to every person that upon the records of the governing body of the city was required to be entered the specific indebtedness proposed to be refunded, together with the details of the proposed issue of refunding bonds, and that it was only for such specified indebtedness that any refunding bonds could be issued. To that record every purchaser was referred by the very act under which alone the bonds in suit were issued."

The learned Judge is demonstrably mistaken in supposing that the statute required to be entered upon the

records the specific indebtedness proposed to be refunded. A reading of the statute above quoted shows that this is not the fact. The statute only requires that "the notice of election shall recite the indebtedness to be refunded" (Sec. 1), and the statute nowhere requires that such notice of election be spread upon the records of the city. The learned Judge was mistaken, therefore, in supposing that even if a *bona fide* purchaser were put upon notice of such records he would have had constructive notice of the specific indebtedness proposed to be refunded. Of course, in any case of constructive notice, a person has constructive notice of only what is required by law to be put on a record (See cases on our brief hereto attached pp. 39-43).

But, even if the specific indebtedness to be refunded was required by the statute to be entered upon the records of the city, still a *bona fide* purchaser of these negotiable bonds with such recitals as these bonds contain would not have been put upon notice of such indebtedness.

ARGUMENT.

Evansville vs. Dennett Controlling in Present Cause.

The precise question involved in the present case has been decided by this Court in *Evansville vs. Dennett*, 161 U. S., 464, directly contrary to the opinion of the two Judges of the Circuit Court of Appeals, Ross and HAWLEY, in the present case. Mr. Justice HARLAN, giving in the case last cited the unanimous decision of this court, answered all the following ques-

tions in favor of the *bona fide* holder, to wit (pp. 439–440, 446):

"1. Does the recital in the series of bonds issued in payment of subscription to the Evansville, Henderson and Nashville Railroad Company, that they were issued in 'pursuance of an Act of the Legislature of the State of Indiana and ordinances of the City Council of said city, passed in pursuance thereof,' put a purchaser upon inquiry as to the terms of the ordinances under which the bonds were issued? [No].

"2. Does the recital in the series of bonds issued to the Evansville, Carmi and Paducah Railroad Company, that they were issued 'by virtue of a resolution of said City Council passed May 23, 1870,' put a purchaser upon inquiry as to the terms of that resolution, and charge him with knowledge of its terms? [No].

"3. Do the recitals in the bonds issued to the Evansville, Carmi and Paducah Railroad Company, as against a *bona fide* purchaser for value of such bonds, estop the City of Evansville from asserting that such bonds were not issued, for stock subscribed, upon a petition of two-thirds of the resident freeholders of the city, distinctly setting forth the company in which stock was to be taken, and the number and amount of shares to be subscribed? [Yes].

"4. Under the recitals in the bonds issued to the Evansville, Carmi and Paducah Railroad Company was a *bona fide* purchaser for value put upon inquiry to ascertain whether a proper petition of two-thirds of the residents of Evansville, freeholders of that city, that body had subscribed for stock in the said railroad company? [No].

"5. Was a *bona fide* purchaser for value of the bonds issued to the Evansville, Carmi and Paducah Railroad Company charged by the recitals in said bonds with notice that they were issued in pursuance of an invalid act, and in pursuance of an election under it [No], or had such a purchaser a right to assume, from the recital, that the prerequisites of both the valid act and the invalid act had been observed by the Common Council before the issuance of such bonds?" [Yes].

The recital in one issue of the bonds in the case of *Evansville vs. Dennett* was that they were issued "*in*

pursuance of an act of the legislature of the State of Indiana *and ordinances* of the city council of such city, passed in pursuance thereof;" and in the other issue of said bonds, "*by virtue of an act* of the general assembly of the State of Indiana entitled * * * and *by virtue of the resolution* of said city council of said city, passed October 4, 1869; * * * and *by virtue of a resolution* of said city council, passed May 23, 1870," &c. The decision of this court in said case of *Evansville vs. Dennett* was that this recital in the bonds of a particular resolution specifically by date "*did not put a purchaser upon inquiry as to the terms of that resolution and charge him with knowledge of its terms.*" Much less does the recital generally that a bond is issued in pursuance of an ordinance put the *bona fide* purchaser of such negotiable bonds upon inquiry as to the terms of such ordinance.

The statement of Circuit Judge Ross in the opinion of the two Judges of the Circuit Court of Appeals in the present case that "such bodies [as city councils] can only act by order, ordinance, or resolution, as every one is bound to know," was equally true in the case of *Evansville vs. Dennett;* and not only so, but it was expressly recited in the bonds in *Evansville vs. Dennett* that such action had been by ordinance and resolution, and, of course, those ordinances and resolutions were upon the records of the municipality in *Evansville vs. Dennett* as well as in the present case. It is so in the case of every municipality. There is nothing peculiar in this respect in the present case, but it stands on precisely the same footing as the case of *Evansville vs. Dennett.* The charter of the city of Evansville (Sess. Laws, Ind., 1847, p. 9, sec. 26 *et seq.*), which was in force, and which

applied in respect to the proceedings for the issue of the bonds there in question, as well as for other corporate proceedings, provided:

"The common council shall keep a full and fair record of all their proceedings. * * * The Clerk shall attend all meetings of the council, and make and keep a record of their proceedings. * * * It shall also be the duty of the clerk to safely keep and preserve all records, books, and papers belonging to the city of Evansville, and appertaining to or deposited in his office, entire and without injury or mutilation, and to hand them over, together with all other property of said city in his hands, to his successor. * * * This act shall be deemed and taken to be a public act, and as such may be read as evidence in any court, without being pleaded or particularly referred to in pleading; * * * and transcripts of the records and proceedings of the said common council, certified by the mayor, under the corporate seal, shall be evidence in all courts," &c.

In all this there was nothing peculiar either to the city of Evansville or to the city of Santa Cruz. Substantially these provisions as to the keeping of records of proceedings are true of every municipality, and it is also true that such municipalities can only act by order, ordinance or resolution. The fact referred to by Circuit Judge Ross in giving the opinion of the two Judges of the Circuit Court of Appeals in the present case is that "such ordinance was a part of the public records of the city, which by its charter are required to be kept in 'large, well-bound, uniform and suitable books.'" This, as we have seen, was equally true in the case of *Evansville vs. Dennett*, as in the case of every other municipality. We refer to the language of the court on this point, because it shows the fundamental error which led to the decision of the Court of Appeals in the present case.

Negotiable municipal bonds payable to bearer are transferable by delivery, and a purchaser of them on general principles is not bound to examine the ordinances and proceedings under which they are issued. They are negotiable, and are not subject to any defense that certain facts existed outside of the bonds themselves which constitute a defense to them, except the want of statute authority to issue bonds. Such negotiable bonds are designed to pass and do pass from hand to hand by delivery. Savings banks and other banks and trust companies and individuals purchase the same or lend money on the same on the delivery of the bonds to them, and they do this relying on the protection which their negotiable character gives to them. Thus, the 18 or 20 banks, trust companies or individuals who were the purchasers of the refunding bonds involved in the present case acquired the same relying upon their negotiable character.

For a court to hold that such bonds are non-negotiable, and that any bank, trust company or other purchaser must examine all the records of the municipalities issuing them would be to upset the universal course of dealing in these securities by all the saving banks and moneyed institutions in the country to the prejudice of the municipalities as well as the investors. The far-reaching effect of any such decision is obvious. It would prevent the municipalities which rely upon the sale of such securities for the means of making permanent improvement, such, for example, as acquiring water works as in the present case, from making advantageous sales of such bonds, and would generally prevent the dealing in them by savings banks and other institutions which have money to invest or lend, because they would never buy or deal in non-negotiable paper

on any such conditions. Of course, it is competent for the constitution or statutes of a State expressly to provide that municipal bonds shall not be negotiable, but shall be open to every defense to which a non-negotiable obligation would be subject, but it is easy to see why they do not so provide. Thus, Mr. Justice HARLAN states in the recent case of *Gunnison County Commissioners vs. E. H. Rollins & Sons*, 173 U. S., 255:

> "Indeed, it is entirely competent for a State to provide by statute that all obligations, in whatever form executed by a municipality existing under its laws, shall be subject to any defense that would be allowed in cases of non-negotiable instruments. But for reasons that every one understands no such statutes have been passed. Municipal obligations executed under such a statute could not be readily disposed of to those who invest in such securities."

Not only are negotiable municipal bonds generally not open to any such defense as that attempted to be raised in the present case, but especially is it true when the bonds, as do the present bonds, recite specifically the truth of the very fact the falsity of which is attempted to be set up as a defense. The statute of California now in question authorizes the issue by a city of refunding bonds to refund "*outstanding indebtedness evidenced by bonds thereof.*" The bonds in suit expressly recite that they are "issued by the city of Santa Cruz *for the purpose of refunding bonded indebtedness of said city*," and this express recital estops the municipality from showing the contrary—namely, showing that the bonded indebtedness which is refunded is not the bonded indebtedness of the city.

This court in the case of *Evansville vs. Dennett* answered in the affirmative the following question certified by the Circuit Court of Appeals:

"3. Do the recitals in the bonds issued to the Evansville, Carmi and Paducah Railroad Company, [*i. e.*, that the bonds are issued "by virtue of an act" conferring upon the city the power to subscribe for stock and issue bonds] as against a *bona fide* purchaser for value of such bonds, estop the city of Evansville from asserting that such bonds were not issued, for stock subscribed, upon a petition of two-thirds of the resident freeholders of the city, distinctly setting forth the company in which stock was to be taken, and the number and amount of shares to be subscribed?"

And this court also in said case answered in the affirmative the last clause of the fifth question; namely:

"Or had such a purchaser the right to assume, from the recital, that the prerequisites of both the valid act and the invalid act had been observed by the common council before the issuance of such bonds?"

See further in regard to *Evansville vs. Dennett*, the brief hereto attached, p. 14 *et seq.*

Not only was this decision rendered in the *Evansville case*, but in the case of *Gunnison County Commissioners vs. E. H. Rollins & Sons*, 173 U. S., 255, this court unanimously held that the express recital in the bonds of Gunnison county that they did not exceed in amount the limit prescribed by the constitution of the State of Colorado estopped the county from showing by its records or other facts outside of the bonds themselves that the bonds themselves were in excess of the limit. In that case also it was urged by the defendant county that the county was obliged to keep records which were public and open to all purchasers of bonds, and these records were introduced in evidence before the trial court as showing that the bonds had been issued in excess of the constitutional limit, and that they were therefore void. This court

held that such admission of these records was error, and that the county was estopped by the recital in the bonds from making any such defense, although the records, if consulted, might have shown the illegality of the bonds in this respect.

Gunnison County Case also a Controlling Authority for the Petitioner in this Case.

We ask particular attention to the *Gunnison County case*, among other reasons, because it came before this Court on a writ of *certiorari* issued to the Circuit Court of Appeals for the Eighth Circuit. This Court considered the question involved in the *Gunnison County case* of such great importance that it issued its writ of *certiorari*, to bring the case before this Court for review. The same question precisely is involved in the present case, and is the one on which the present case was decided by both the Circuit Court and the Circuit Court of Appeals, and on which in the present case the Judges in the Ninth Circuit are evenly divided. The *Gunnison County case* involved especially the question whether the purchaser of municipal bonds was bound to notice the records of the municipality pertaining to the issue of such bonds. Additional time was allowed to counsel, and the case was, as this Court will recall, argued with great ability in behalf of the county by Governor THOMAS, of Colorado, and other counsel, and the question upon which the Court of Appeals made the decision of the present case turn was thoroughly discussed by counsel and fully and carefully considered by this Court in the said *Gunnison County case*, all of which will appear by the

reference to that case in the Brief hereto attached, on pages 28 to 32, to which, without repeating here the arguments, we respectfully, but earnestly, ask the attention of this Court, as we insist that the decision in this case by the Circuit Court of Appeals is directly in the teeth of the *Gunnison County case*, as well as in the case of *Evansville vs. Dennett.* These cases laid down, indeed, no new doctrine, for the same principle had been laid down by this Court, under facts substantially the same, in *Hackett vs. Ottawa*, next to be cited, and that case, in its turn, as will be seen by the opinion of Mr. Justice HARLAN, follows in its application the principle of previous cases in this Court.

Hackett vs. Ottawa also in Point for the Petitioner.

The case of *Hackett vs. Ottawa*, 99 U. S., 86, unanimously decided by this court, Mr. Justice HARLAN delivering the opinion, is precisely in point. That case involved the validity of certain negotiable bonds issued by the city of Ottawa, Illinois. Under the charter of the city and the constitution of the State there was power to issue bonds for corporate purposes of the city. The bonds in question which had been issued by the city recited, among other things, that they were issued (p. 86) "by virtue of the charter of said city," also "in accordance with a certain ordinance passed by the city council of said city on the 15th day of June, A. D. 1869, entitled 'An ordinance to provide for a loan for municipal purposes,' which ordinance was ratified by a majority of all the qualified voters of said city at an election holden on the 20th day of July, A. D. 1869, and in conformity with an ordinance passed by the city coun-

cil of said city on the 30th day of July, 1869, entitled 'An ordinance to carry into effect the ordinance of June 15, 1869, entitled "An ordinance to provide for a loan for municipal purposes."'" The defendant pleaded as a defense to the said bonds that they were in fact issued and donated to one Cushman or the Ottawa Manufacturing Company, and that they were not issued for any municipal purpose whatever, and it was claimed that these facts appeared from the ordinance whose date and title were given on the face of the bonds. This court however, held that no such defense could be made as against the *bona fide* holder of the said bonds. Mr. Justice HARLAN, giving the opinion of the court, says (pp. 90, 91):

"The bonds in suit upon their face import: 1st, That the faith of the city is irrevocably pledged for their payment. 2d, That they were issued in pursuance of the power which the council possessed to borrow money on the credit of the city and issue bonds therefor, and also in accordance with certain ordinances which provided for a loan for *municipal* purposes. The recitals of the bonds, in themselves, furnish no ground whatever to suppose that the council transcended its authority, or issued them for other than such purposes. They justify the opposite conclusion.

"The city, however, claims that they were not issued for municipal purposes, but as a simple donation to a private corporation, formed for business ends solely, and in no wise connected with or under the control of the city,—all of which, it is further claimed, appears from the ordinances, whose date and title are given in the face of the bonds.

"The ordinance of June 15, 1869, authorizes the mayor to borrow, in the name, for the use, and upon the bonds of the city, the sum of $60,000, 'to be expended in developing the natural advantages of the city for manufacturing purposes.' * * * The ordinance of July 30, 1869, was to carry into effect that of June 15, 1869. It directed the mayor to deliver the bonds to one Cushman, 'to be used by him in develop-

ing the natural resources of the surroundings of the city, and that the said Cushman is authorized and directed to expend the sum in the improvement of the water-power upon the Illinois and Fox Rivers within the city and in the immediate vicinity thereof, under the franchises and powers which have been granted for that purpose, in the manner which, in his judgment, shall best secure the practical and permanent use of said water-power in the city and its immediate vicinity.'"

It was contended, among other things, by the holders of the bonds that these were proper corporate purposes of the city. This court, however, did not decide that question, Mr. Justice HARLAN saying (pp. 95, 96):

"But a direct decision of that question does not seem to be essential to the disposition of this case. We content ourselves with stating the propositions which counsel have urged upon our consideration, and without expressing any settled opinion as to what are corporate purposes within the meaning of the Illinois constitution, we pass to another point, which, in our judgment, is fatal to the defense. It is consistent with the pleas filed by the city that the testator of plaintiffs in error purchased the bonds before maturity for a valuable consideration, without any notice of want of authority in the city to issue them, and without any information as to the objects to which their proceeds were to be applied, beyond that furnished by the recited titles of the ordinances. For all corporate purposes, as we have seen, the council, if so instructed by a majority of voters attending at an election for that purpose, had undoubted authority, under the charter of the city, to borrow money upon its credit and to issue bonds therefor. The bonds in suit, by their recitals of the titles of the ordinances under which they were issued, in effect, assured the purchaser that they were to be used for *municipal* purposes, with the previous sanction, duly given, of a majority of the legal voters of the city. If he would have been bound, under some circumstances, to take notice, at his peril, of the provisions of the ordinances, he was relieved from any responsibility or duty in that regard by reason of the

representation, upon the face of the bonds, that the ordinances under which they were issued were ordinances 'providing for a loan for municipal purposes.' Such a representation by the constituted authorities of the city, under its corporate seal, would naturally avert suspicion of bad faith upon their part, and induce the purchaser to omit an examination of the ordinances themselves. It was, substantially, a declaration by the city with the consent of a majority of its legal voters, that purchasers need not examine the ordinances, since their title indicated a loan for municipal purposes. The city is therefore estopped, by its own representations, to say, as against a *bona fide* holder of the bonds, that they were not issued or used for municipal or corporate purposes. It can not now be heard, as against him to dispute their validity. Had the bonds, upon their face, made no reference whatever to the charter of the city, or recited only those provisions which empowered the council to borrow money upon the credit of the city and to issue bonds therefor, the liability of the city to him could not be questioned. Much less can it be questioned, in view of the additional recital in the bonds, that they were issued in pursuance of an ordinance providing for a loan for municipal purposes; that is, for purposes authorized by its charter. *Supervisors v. Schenck*, 5 Wall. 772. It would be the grossest injustice, and in conflict with all the past utterances of this court, to permit the city, having power under some circumstances to issue negotiable securities, to escape liability upon the ground of the falsity of its own representations, made through official agents and under its corporate seal, as to the purposes with which these bonds were issued. Whether such representations were made inadvertently, or with the intention, by the use of inaccurate titles of ordinances, to avert inquiry as to the real object in issuing the bonds, and thereby facilitate their negotiation in the money markets of the country, in either case, the city, both upon principle and authority, is cut off from any such defense. What this court declared, through Mr. Justice CAMPBELL, in *Zabriskie v. Cleveland, Columbus & Cincinnati Railroad Co.*, (23 How. 381), as to a private corporation, and repeated, through Mr. Justice CLIFFORD, in *Bissell v. City of Jeffersonville* (24 *Id.* 287), as to a municipal corporation, may be reiterated as peculiarly applicable to this case: 'A corporation, quite as much as an

individual, is held to a careful adherence to truth in their dealings with mankind; and can not, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced."

The charter of the city of Ottawa contains the usual provisions as to keeping, and publishing from time to time a journal of its proceedings, especially ordinances authorizing the issue of bonds, as will appear by extracts from the charter of that city, given in the foot note.*

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* ART. 2, SEC. 9. The city council shall keep a journal of its proceedings, and from time to time publish the same, and the yeas and nays, when demanded by any member present, shall be entered upon the journal.

ART. 5, SEC. 3. The city council shall have power * * * * * to borrow money on the credit of the city, and to issue bonds therefor, and pledge the revenue of the city for the payment thereof.

ART. 5, SEC. 38. The city council shall have power to make all ordinances which shall be necessary and proper for carrying into execution the powers specified in this act, so that such ordinances be not repugnant to nor inconsistent with the constitution of the United States or this state.

ART. 5, SEC. 40. All ordinances passed by the city council shall, within one month after they have been passed, be published in some newspaper in the city, and shall not be in force, except as aforesaid, until they have been published as aforesaid.

ART. 5, SEC. 41. All ordinances of the city may [be] proven by the seal of the corporation, and when printed or published in book or pamphlet form, and purporting to be published by authority of the corporation as in force, the same shall be received in evidence in all courts and places without further proof.

ART. 10, SEC. 20. No money shall be borrowed by the city council until the ordinance passed therefor shall be submitted to and voted for, by a majority of the voters of said city, attending an election held for that purpose.

Charter of City of Ottawa, Session Laws, Illinois, 1853, p. 296.

Nothing Peculiar in this Case as to the Record to be Kept by the Municipality, or to take it out of the Established Doctrine of this Court.

As stated above Circuit Judge GILBERT gave a dissenting opinion in the present case (Record, p. 591), to which we call the special attention of this court, and which we submit is both on principle and authority conclusive in favor of the validity of these bonds. The learned Judge cites numerous cases of this court supporting his opinion. Among other things he says (Record, p. 599):

"In the latter case [*Evansville vs. Dennett*, 161 U. S., 434,] the bonds contained the recital that they were issued by virtue of a certain designated act of the legislature as well as by virtue of a resolution of the city council, ordering an election of the qualified voters of the city, which resulted in a legal majority in favor of such subscription. The court said: 'As therefore the recitals in the bonds import compliance with the city's charter, purchasers for value having no notice of the non-performance of the conditions precedent, were not bound to go behind the statute conferring the power to subscribe, and to ascertain, by an examination of the ordinances and records of the city council, whether those conditions had, in fact, been performed. With such recitals before them they had the right to assume that the circumstances existed which authorized the city to exercise the authority given by the legislature.'"

We do not quote the whole of Judge GILBERT's opinion, but respectfully request this court to read it in its entirety. He says among other things (Record, p. 594):

"In the present case the opinion of the majority of the court seems to have been influenced by the fact that by the charter of the city of Santa Cruz a public

record of its ordinances is required to be kept in books accessible to the public, and by the further fact that the city officers who were impliedly authorized to issue the refunding bonds were not expressly empowered to make any certificate or representation to prospective purchasers in respect to the character of the indebtedness for the payment of which the refunding bonds were issued. As far as the first consideration is concerned, it is sufficient to say that the charters of all municipal corporations require similar public records of their proceedings, and that such was undoubtedly the case with the city of Ottawa; yet in *Hackett v. Ottawa*, the court deemed that fact immaterial to the question which was before it, held that a purchaser of bonds was not bound to inspect such records, and disposed of the case upon the general principles of estoppel applicable to all cases. Neither can any distinction between that case and the case at bar be predicated upon the fact that the act of March 1st, 1893, under which the refunding bonds of the city of Santa Cruz were issued conferred no express power upon the officers of the city to certify to any particular fact in connection with the proceedings on which the bonds were issued, or to make any recitals whatever upon the bonds. The proceedings were had under a statute that not only conferred authority to refund the bonded indebtedness but imposed a duty upon the city to determine whether the occasion had arisen to refund, and if so, to determine wherein the bonded indebtedness consisted, and the nature and amount thereof. Under this authority the city determined that the Water Company's bonds were a portion of its bonded debt, and as such subject to be refunded. The officers of the city of Santa Cruz who executed the refunding bonds were the officers whose duty it was to issue them. Before doing so they were obliged to determine for themselves that the antecedent steps had been taken which were indispensable to the issuance thereof, and they were empowered by an ordinance of the city to recite upon the bonds the facts usually recited upon such instruments—the facts upon which the purchaser was authorized to proceed and on which he might rely as was done in the Ottawa case. The bonds were executed under the seal of the city and were signed by the mayor and the city clerk. These were the officers whose duty it was to sign such instruments. Said the court in the *Town of Coloma v.*

Eaves, 92 U. S. 484, 488: 'At some time or other, it is to be ascertained whether the directions of the act have been followed; whether there was any popular vote; or whether a majority of the legal voters present at the election did, in fact, vote in favor of the subscription. The duty of ascertaining was plainly intended to be vested somewhere, and once for all; and the only persons spoken of who have any duties to perform respecting the election, and action consequent upon it, are the town clerk and the supervisor or other executive officer of the city or town. It is a fair presumption, therefore, that the legislature intended that those officers, or one of them at least, should determine whether the requirements of the act prior to a subscription to the stock of a railroad company had been met.' The bonds in question in the present case contain a recital that they were issued 'for the purpose of refunding the bonded indebtedness of said city,' in pursuance of the act of March 1st, 1893, 'and in pursuance of, and in conformity with, the constitution of the state of California, and the ordinances of the city of Santa Cruz, and in pursuance of, and in conformity with, a vote of more than two thirds of all the qualified electors of said city, etc.,' and contained the certificate, 'that all acts, conditions, and things required by law to be done precedent to, and in the issue of said bonds, have been properly done, happened and performed, in legal and due form, and as required by law.' Here is a distinct certificate that the bond was issued for the purpose of refunding the bonded indebtedness of the city. This recital was expressly authorized by an ordinance of the city before the bonds were issued."

The learned Judge thus states and shows, and we also show in this brief and in the brief hereto attached and made part hereof, that there *is nothing peculiar in the charter of Santa Cruz as to a public record of its ordinances being kept.* The same thing is true of every municipality, and has been true in all the numerous cases decided by this court, in regard to the effect of recitals in negotiable municipal bonds.

There is also *nothing peculiar* in this case of Santa

Cruz as to *an absence in the statute of express authority to make recitals.* In none of the numerous cases decided by this court has any *express* power to make recitals existed in the statutes under consideration. In *Bernards Township vs. Morrison*, 133 U. S. 523, 527, this court says:

"It is urged * * * that the statute does not in terms give them [*i. e.*, commissioners who were not even general officers of the township] authority to determine whether the preliminary conditions have been complied with; and that this case is, therefore, to be distinguished in these respects from those cases where similar recitals have been held conclusive. But though not the ordinary officers of the township, they were the ones to whom by legislative direction was given full authority in the matter of issuing bonds. * * * While it is true that the act does not in terms say that these commissioners are to decide that all preliminary conditions have been complied with, yet such express direction and authority is seldom found in acts providing for the issuing of bonds."

This court accordingly held that such commissioners had power to make recitals, and that those recitals would estop the township.

The decision of the Circuit Court in the present case holding these bonds valid was cited with approval and followed by the United States Circuit Court of Appeals for the Seventh Circuit in *Wesson vs. Town of Mt. Vernon*, 98 Fed. Rep., 804, 810 (the same court also citing to the same effect *Gunnison County vs. Rollins*, 173 U. S., 255). The Circuit Courts of Appeals for the Seventh Circuit and the Ninth Circuit are thus diametrically opposed on the very point on which we ask this writ of *certoriari*.

In the *Gunnison case* just cited Governor THOMAS insisted in argument that there could be no estoppel by recital as against a *constitutional* debt limit pro-

vision, but the Court held otherwise by its unanimous decision in that case. *A fortiori* the recitals in the bonds in the present case are binding where the only defect alleged is one supposed to arise in the detail of carrying out the provisions of the enabling statute.

The plaintiff was the bona fide holder of these bonds and entitled to maintain this suit upon them.

A *bona fide* holder is a purchaser for value without notice, or the successor of one who was such purchaser (*McClure vs. Oxford Township*, 94 U. S., 429). These bonds and the coupons are payable to bearer and transferable by delivery, and may be sued upon by the bearer. As the previous holders of the bonds in suit were *bona fide* holders for value (Findings of Court, Record, p. 44), the plaintiff can avail himself of such previous holders' position without showing that he himself has paid value (*Montclair vs. Ramsdell*, 107 U. S., 147).

It is no objection to the maintenance of this action that the plaintiff did not pay any money consideration for the assignment to him of any of the said bonds or coupons, but all said bonds and coupons were assigned to plaintiff for collection only, for all the holders of these bonds were non-residents and not citizens of the State of California. On this point see the case of *Bernards Township vs. Stebbins*, 109 U. S., 341, in which case certain citizens of New Jersey, New York and Pennsylvania had delivered bonds and coupons to the plaintiff (p. 347) "*solely for the purpose of bringing suit*" on the same. This court held that so far as

respects the coupons or bonds owned by the citizens of such States other than the State of New Jersey the suit could be maintained in the Federal court but could not be maintained as respects the bonds or coupons owned by the citizens of the State of New Jersey, of which State the defendant was a citizen. The court on this point said (p. 356):

"But no valid objection has been shown to the maintenance of these bills, so far as regards those bonds of which the plaintiffs are the bearers, and which are actually owned, either by themselves, or by other citizens of New York or Pennsylvania, to a sufficient amount by each owner to sustain the jurisdiction of the circuit court" (citing numerous cases).

Accordingly, in the present case, both the Circuit Court and also the Circuit Court of Appeals held that the Federal court had jurisdiction.

Of course, if the Federal court had not jurisdiction of the case, then the proper judgment of the Circuit Court of Appeals would not have been to reverse the cause with direction to enter judgment for the defendant, as was done in the present case (Record, p. 602), but to reverse the cause with direction to dismiss the action, so that any judgment would not be an estoppel. And in this view the judgment of the Circuit Court of Appeals would be clearly erroneous and should be reversed.

The Annexed Brief.

We annex to this brief as a part hereof a printed copy of the brief filed by us in the United States Circuit Court of Appeals, on petition for rehearing in this case, and respectfully ask the attention of this court to the arguments therein stated at length.

It is entirely applicable on the present application, and it states our points and views as clearly as we are able to present them.

We call the special attention of the court, among other things, to POINT II. of the said brief, at page 53, namely, that, inasmuch as the city of Santa Cruz had purchased the plant of the water company, subject to the mortgage securing the $89,000 of bonds of said company, assuming and agreeing to pay the said bonds, therefore these bonds were an "outstanding indebtedness of the city of Santa Cruz, evidenced by bonds," within the meaning of the act of March 1, 1893, authorizing the issue of refunding bonds.

Conclusion.

In conclusion, we respectfully submit to this court that the views which are stated by the Circuit Court of Appeals as the ground, and the *only* ground for its decision in the present case, namely, that the *bona fide* holder of a negotiable municipal bond, payable to bearer and transferrable by delivery, is put upon notice of what is contained in the books of records of proceedings of the municipality issuing the bonds, would overturn the whole doctrine of negotiable municipal bonds. They would no longer be negotiable according to the law merchant; that is, transferrable by delivery, and be protected in the hands of the purchaser against any equities and defenses not appearing upon their face, but they would, in substance and effect, be reduced to the quality of instruments non-negotiable according to the law merchant. Any such doctrine is, as we have shown in this brief and in the accompanying brief, directly contrary to the numerous decisions of

this court, and especially to the decisions in the cases of *Hackett vs. Ottawa*, *Evansville vs. Dennett*, *Gunnison County vs. Rollins*, and the other cases referred to in the annexed brief.

These bonds, as appears by the record in this case, had been regularly issued by the city, voted for by the electors, executed and delivered by the city, and had passed into the hands of about a score of purchasers for value—savings banks, national banks, trust companies and other purchasers, and investors and lenders on negotiable paper—in the regular course of business. The decision of the Circuit Court of Appeals in the present case is to the effect that all these numerous holders of these bonds and coupons must lose their money because they did not each one, before lending any money on these negotiable bonds containing the recital that they were issued to refund bonded indebtedness of the city of Santa Cruz, make a journey across the continent and examine for themselves the records and books of the city of Santa Cruz—for what? For the purpose of finding evidence to contradict the express recital in the bonds that they are issued "to refund the bonded indebtedness of said city." The impracticability, not to say anything of the gross injustice of any such doctrine, is obvious. It is not the doctrine of this court, and the decision of the Circuit Court of Appeals should be reviewed by this court on *certiorari*, and that decision should be reversed.

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HARRY HUBBARD,
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Of Counsel for Petitioner.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE CITY OF SANTA CRUZ,
Plaintiff in Error,
against
ALBERT H. WAITE,
Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

Brief on Behalf of Defendant in Error on Petition for Rehearing.

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C. G. Burgoyne, Walker and Centre Streets, New York.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE CITY OF SANTA CRUZ,
Plaintiff in Error,

AGAINST

ALBERT H. WAITE,
Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF ON BEHALF OF DEFENDANT IN ERROR ON PETITION FOR REHEARING.

Statement of the Case.

The evidence showed, and the Circuit Court found, and this Court also held, that the plaintiff is a *bona fide* holder of the bonds and coupons in question, or, what is the same thing, that he derives his title from such *bona fide* holder. This statement does not include the three bonds and coupons mentioned in Finding 3 of Findings of Fact by the Circuit Court (Record, p. 34).

A *bona fide* holder is a purchaser for value without notice, or the successor of one who was such purchaser.

McClure vs. Orford Township, 94 U. S., 429.

If any previous holder of the bonds in suit was a *bona fide* holder for value, the plaintiff can avail himself of such previous holder's position without showing that he has himself paid value.

Montclair vs. Ramsdell, 107 U. S., 147.

Even though he may have notice of infirmities in its origin, a purchaser of a municipal bond from a *bona fide* holder before maturity takes it as free from such infirmities as it was in the hands of such holder.

Douglass County vs. Bolles, 94 U. S., 104.
Marion County vs. Clark, 94 U. S., 278.
Cromwell vs. Sac County, 96 U. S., 51.
San Antonio vs. Mehaffy, 96 U. S., 312.
City of Nauvoo vs. Ritter, 97 U. S., 389.

Recitals in Bonds in present case.

The bonds involved in the present case contain recitals as follows:

"This bond is one of a series of bonds of like date, tenor, and effect, *issued by the said City of Santa Cruz, for the purpose of refunding the bonded indebtedness of said city* and issuing bonds therefor, and providing for the payment of same *under and in pursuance of and in conformity with* the provisions of an act of the legislature of the State of California, entitled 'An act to amend an act entitled "An act authorizing the common council, board of trustees, or other governing body of any incorporated city or town, other than cities of the first class, to refund its indebtedness, issue bonds therefor, and provide for the payment of the same" (approved March 15, 1883),' approved March 1, 1893.

"*And in pursuance of and in conformity with* the Constitution of the State of California, and the ordi-

nances of the city of Santa Cruz, and in pursuance of and in conformity with a vote of more than two-thirds of all of the qualified electors of said city of Santa Cruz, voting at a special election *duly and legally called* and held and conducted in said city as provided under said act, on Tuesday, the thirteenth day of March, 1894, *notice thereof having been duly and legally given and published in the manner as required by law*, and after the result of said election had been canvassed, found and declared in the manner and as required by law.

"And it is hereby certified and declared that *all acts, conditions and things required by law to be done precedent to and in the issue of said bonds, have been properly done, happened, and performed in legal and due form, as required by law*" (Record, pp. 9, 10).

The alleged illegality in the issue of the refunding bonds in question was that they were issued in part to refund bonds of a water company, which water-company bonds the city had assumed upon the purchase of the water plant, agreeing to pay the same; thus, in substance and effect, making them the bonds of the city. It is claimed by the city, and the opinion of this court assumes, that any purchaser of these refunding bonds is bound to look at the ordinances, notices and proceedings of the city authorizing the issue of these refunding bonds.

It is further claimed that, if the ordinance calling the election had been examined by a person intending to purchase the refunding bonds, he would have seen therein the notice of election, and that such notice of election stated that the refunding bonds were issued in part for the purpose of refunding water-company bonds thus assumed by the city.

We do not admit that the water-company bonds thus assumed by the city were not bonds of the city within the meaning of the statute that authorized the city to issue refunding bonds. But whether they were or not

is immaterial so far as a *bona fide* holder of refunding bonds is concerned.

I.

We respectfully submit to the Court that its opinion rendered in this cause is erroneous, in that the said opinion holds that a bona fide holder of the refunding bonds and coupons in question, notwithstanding the said bonds and coupons are negotiable, and notwithstanding the recitals in the said bonds, is bound to look at and examine the ordinances, notices or other proceedings of the city under which the bonds were issued, particularly the ordinance calling the election, in which ordinance was set forth the notice of election and in which notice was the statement that the bonds were issued in part for refunding water company bonds assumed and agreed to be paid by the city.

The numerous cases decided in the Supreme Court of the United States as to the effect of negotiability of bonds, and also as to the effect of recitals therein, such as the recitals contained in the present bonds—especially the cases of *Evansville vs. Dennett*, 161 U. S., 434, *Graves vs. Saline County*, 161 U. S., 359, and *Gunnison County Commissioners vs. E. H. Rollins & Sons*, 173 U. S., 255—are conclusive to the effect that a *bona fide* holder of such negotiable bonds or coupons, containing such recitals, is not bound to look at or

examine the ordinances, notices or other proceedings of the city authorizing the issue of the bonds.

It is well settled that municipal bonds, payable to bearer and the coupons thereof, such as are the bonds and coupons in the present case, are negotiable instruments; that is, negotiable according to the law merchant. It is, of course, not necessary to cite to this Court the numerous decisions of the Supreme Court of the United States to this effect. This negotiability means something. It means that an instrument of this kind for the payment of money, payable to bearer, is intended to pass by delivery from hand to hand, and to give a good title thereto to the person who pays his money therefor without any notice of any illegality in respect thereof. The further effect of such negotiability is to cut off the maker from setting up any defense to such instruments, except that he did not make the instruments (in other words, what was known at common law as the plea of *non est factum*), and as respects municipal corporations this includes everything except the question whether there was power given in the Constitution or statute to issue such bonds. As respects such negotiable instruments, the maker thereof, whether the maker be a municipal corporation or an individual, cannot set up any defense such as that it or he did not receive payment for the bonds, or that the bonds were in fact issued for an unauthorized purpose, or that the proceeds of the said bonds were in fact appropriated in whole or in part to an unlawful purpose. When there is power given by statute to issue such negotiable instrument, and such instrument has been issued, and has passed into the hands of a *bona fide* holder for value, it is too late to set up any such defense. This results from the mere negotiability of the bonds under the law merchant, as has

been decided in numerous cases in the Supreme Court of the United States and in other courts.

The principles which apply as to negotiable instruments, where such instruments have come into the hands of *bona fide* holders, are well stated by Chief-Justice BIGELOW in the case of *Fearing vs. Clark*, 16 Gray (Mass.), 74 (approved by the U. S. Supreme Court in the case in 170 U. S., 593, 604, next cited in this brief), where the court says:

"The defendant proved no facts at the trial which constituted a valid defense to the note declared on as against the plaintiff, who is a *bona fide* holder for value, without notice. The rule is well settled that, when a note is transferred by a party to whom it is entrusted without authority, or fraudulently, it will be valid as against the maker in the hands of a holder who takes it *bona fide* without notice of the special circumstances under which the note came into the possession of the payee or agent of the maker who puts it in circulation. In such case the maker or endorser who places it in the hands of another for the purpose of being used in a particular way or for a special object takes the risk of its being used in a different way, and cannot refuse to pay it to any *bona fide* holder into whose hands it may come (Chit. Bills (10th ed.), 198; *Sweetser vs. French*, 2 Cush., 309). It is undoubtedly true that, as between the original parties to a note, or those who take it with notice, it is essential that there should have been a delivery of the note by the maker to take effect as a contract. In this sense delivery is included in the allegation of making. But the rule is qualified and limited as between the maker and a *bona fide* holder. In such case a valid delivery can be made by any person to whom the maker has given the note in such form as to enable him to hold himself out as absolute owner of the note. The case of *Putnam vs. Sullivan*, 4 Mass., 45, is a strong one on this point. There the notes were delivered to a clerk to be used for special purposes only, and it was held that a delivery by the clerk, whether through deception practiced on him or by a voluntary violation of the trust reposed in him, must be deemed in law, as against a *bona fide* holder, a delivery by those who were liable on the notes. The rule is different in regard to a deed, bond or other instrument placed into the hands of a third person as an escrow, to be deliv-

ered on the happening of a future event or contingency. In that case no title or interest passes until a delivery is made in pursuance of the terms and conditions upon which it was placed in the hands of the party to whom it was intrusted. But the law aims to secure the free and unrestrained circulation of negotiable paper, and to protect the rights of persons taking it *bona fide* without notice. It therefore makes the consequences which follow from the negotiation of promissory notes and bills of exchange through the fraud, deception or mistake of those persons to whom they are intrusted by the makers, to fall on those who enabled them to hold themselves out as owners of the paper *jure disponendi*, and not on innocent holders who have taken it for value, without notice."

Another case in point is *Provident Trust Company vs. Mercer County*, 170 U. S., 593. The facts in that case were that the County of Mercer, Kentucky, had subscribed for stock and voted bonds in aid of the construction of the Louisville Southern Railroad. The statute which authorized the issue of the bonds provided (p. 594):

"SEC. 4. The said bonds shall not be binding and valid obligations until the railway of the said company shall have been so completed through such county that a train of cars shall have passed over the same, at which time they shall be delivered to said railroad company in payment of the subscription of such county, and the county shall thereupon be entitled to receive certificates for the stock subscribed, and the county judge of such county shall order that such bonds *shall be deposited with a trustee or trust company, to be held in escrow, and delivered to the said railroad company when it shall become entitled to the same by the construction of its road through such county: Provided, however*, that such trust company or trustee shall, before receiving such bonds, give bond, with good surety, approved by the county judge, for the faithful performance of his or its duty in the premises: *And provided, further*, that no such subscription shall be binding unless such railroad shall pass to or through the corporate limits of the town of Harrodsburg."

The bonds in question in that case were deposited

with a trustee, as provided by said section 4. Afterwards the said trustee delivered the bonds to the railroad company. The county made default in the payment of the interest on the bonds. The Provident Life and Trust Company, a *bona fide*-purchaser of certain of said bonds, brought an action for interest thereon. The defense set up by the county was that the bonds had been delivered by the trustee contrary to the terms of section 4 of the statute above quoted, in that the railroad company had not constructed its road so as to entitle it to the delivery of the bonds at the time such delivery was made by the trustee. This defense was held good by the United States Circuit Court of Appeals for the Sixth Circuit, but the Supreme Court of the United States reversed this judgment. Mr. Justice BREWER, giving the opinion of the Supreme Court, says (p. 604):

"But if the true, the only permissible, construction be otherwise, and the demand of the statute is that the road be actually constructed from the north to the south line of the county, and so constructed that a train of cars shall have passed over it, then the question arises as to the effect of the decision of the trustee that the condition had been complied with, and of his delivery of the bonds, and their subsequent purchase by a *bona fide* holder. It is said that the bonds were placed in escrow, and that when an instrument is so placed there can be no valid delivery until the condition of the escrow has been performed, and if without performance the instrument passes out of the hands of the one holding it in escrow it is not enforcible against the maker, and that in a suit on the instrument the inquiry is always open whether the condition of the escrow has been performed. Whatever may be the rule in case the instrument so placed in escrow be a deed or non-negotiable contract, we are of opinion that a different rule obtains when the instrument is a negotiable obligation.

"'It is generally agreed that a delivery of negotiable paper left in escrow, contrary to the terms upon which it was to have been delivered, will pass a good

title to the *bona-fide* transferee for value and before maturity.'

"*Long Island Loan and Trust Co.* v. *Columbus etc. Railway*, 65 Fed. Rep. 455, 458.

"In *Fearing* v. *Clark*, 16 Gray, 74, 76, Chief Justice BIGELOW thus states the law:

"'The rule is different in regard to a deed, bond or other instrument placed in the hands of a third person as an escrow, to be delivered on the happening of a future event or contingency. In that case, no title or interest passes until a delivery is made in pursuance of the terms and conditions upon which it was placed in the hands of the party to whom it was intrusted. But the law aims to secure the free and unrestrained circulation of negotiable paper, and to protect the rights of persons taking it *bona fide* without notice. It therefore makes the consequences which follow from the negotiation of promissory notes and bills of exchange through the fraud, deception or mistake of those persons to whom they are entrusted by the makers, to fall on those who enable them to hold themselves out as owners of the paper *jure disponendi*, and not on the innocent holders who have taken it for value without notice.'

"In *Burson* v. *Huntington*, 21 Michigan, 415, 433, it is said:

"'If the maker or indorser, before delivery to the payee, leave the note in the hands of a third person as an escrow, to be delivered upon certain conditions only, * * * and the person to whom it is thus intrusted violate the confidence reposed in him; and put the note into circulation; this, though not a valid delivery as to the original parties, must, as between a *bona fide* holder for value, and the maker or indorser, be treated as a delivery, rendering the note or indorsement valid in the hands of such *bona fide* holder.'

"See also *Vallett v. Parker*, 6 Wend. 615, 620; *Chase National Bank v. Faurot*, 149 N. Y. 532; *Graff* v. *Logue*, 61 Iowa, 704.

"Within these authorities it must be held that when the trustee adjudged that the condition had been complied with and delivered the bonds the railroad company took such a title as, transferred to a *bona fide* holder, enabled him to recover against the county, notwithstanding the condition had in fact not been performed. That the trustee was the agent of the county and responsible to it for the manner in which he discharged this duty is obvious from the provision in the statute that he shall give 'bond, with good surety,

approved by the county judge, for the faithful performance of his duty. If in case the condition was not performed the county had a perfect defense to the bonds, even in the hands of a *bona fide* holder, there were little need of requiring the trustee to give any security."

Graves vs. Saline County, 161 U. S., 359, in point and controlling.

We next call the special attention of the court to the case of *Graves vs. Saline County*, 161 U. S., 359 (1896), for the following reasons:

1. That case, like the case now under consideration, involved the validity of *refunding bonds*, which stand upon a peculiarly favored footing.

2. The bonds which were refunded in that case had been decided by the Supreme Court of Illinois (84 Ill., 292), and were admitted by the Supreme Court of the United States (128 U. S., 526, 538), as stated in *Graves vs. Saline County*, 161 U. S., 359, 372, to have been void and uncollectible even in the hands of *bona fide* holders.

3. The recitals in the bonds which were held valid in *Graves vs. Saline County* were not as broad or as specific as the recitals in the bonds now in suit. On the contrary, the bonds now in suit contain the same recitals in effect that were made in the bonds in *Graves vs. Saline County*, and in addition the specific recital that "all acts, conditions and things required by law to be done precedent to and in the issue of said bonds have been properly done, happened and performed in due and legal form as required by law."

4. The statute under which the Saline County re-

funding bonds were issued required a record to be kept containing matters which if the bondholder was bound to notice would have shown the invalidity of the bonds which were refunded in that case.

As we consider the case of *Graves vs. Saline County* as controlling and decisive in its facts and in its principles of the case at bar, we now state the same at considerable length. In that case the facts were that the County of Saline, State of Illinois had issued $195,000 funding bonds under an act of February 13, 1865, and acts amendatory thereto, approved April 27, 1877, and June 4, 1879. These $195,000 of bonds were issued to fund one set of bonds formerly issued by the county in payment of the subscription to stock of the St. Louis and Southeastern Railway Company, and another set of bonds issued by the county to the Belleville and Eldorado Railroad Company. The Supreme Court of the United States expressly held and stated that the set of bonds issued to the Belleville and Eldorado Railroad Company were absolutely void even in the hands of *bona fide* holders, the court stating (p. 373):

"If the present case stood only on the footing of the original conditional contract of subscription, we would be compelled to follow the holding of the Supreme Court of Illinois, and to hold that *the original bonds were uncollectible even by innocent holders.*"

The Supreme Court then proceeded to state and consider the fact that the said void bonds had been funded under the said statutes and by authority of a vote of the people of the County, and expressly held and decided that the funding bonds so issued were valid bonds of the County in the hands of *bona fide* holders. The questions certified by the Circuit Court of Appeals on this point were as follows (p. 367):

"FIRST. Is the County of Saline estopped by the recital in the funding bonds to assert that the bonds issued to the St. Louis and Southeastern Railway Company and to the *Belleville and Eldorado Railroad Company*, respectively, and for which the funding bonds were exchanged, were not binding, subsisting legal obligations of said county?

"SECOND. *Are the funding bonds so issued by the County of Saline legal, valid and binding obligations upon said county in the hands of a bona fide holder for value before maturity?*

"THIRD. If the court should be of opinion that the funding bonds are invalid, would it be competent for the court in this cause, which is a suit in equity instituted by the County of Saline to restrain officers of the law from levying and collecting a tax as required by law to pay the interest upon the funding bonds, to grant the relief asked only upon condition that the County of Saline pay to the holders the amount of the valid bonds issued to the St. Louis and Southeastern Railway Company which were exchanged for the funding bonds?"

And the court said in answering these questions (p. 375):

"We, therefore, answer the second question put to us by the Circuit Court of Appeals in the affirmative, and this renders a formal answer to the other questions unnecessary."

In this case of *Graves vs. Saline County*, the Statutes of Illinois, following the universal rule, required that the action of the county officers in issuing the funding bonds, like all other proceedings of the county, be *entered upon the records of the county*; and, if any one had examined those records and proceedings, he would have seen that those bonds were issued to fund other bonds issued to the Belleville and Eldorado Railroad Company, which last mentioned bonds were absolutely void. Not only so, but the statute under which these Saline County bonds were issued (S. L. Ill., 1879, p. 229, § 4) expressly provided, among other things, as follows:

"Upon the issuing of any new bond, or evidence of indebtedness, the clerk, or other officer having custody of the records of the fiscal matters of such county, city, town, township, school district or other municipal corporation, as the case may be, shall make registration thereof, in a book to be kept in his office for that purpose, showing the date, amount, number, class, date of maturity, rate of interest and place of payment of such new bond, or other evidence of indebtedness, and **the description of the bond or evidence of indebtedness, for which, or for the purchasing or retiring of which, the same was given,** as nearly as practicable."

An examination of this record and register kept of these Saline County funding bonds would have shown that these funding bonds were issued to take up the void bonds issued to the Belleville and Eldorado Railroad Company.

Void Even in the Hands of Bona Fide Holders.

The very point of the decision of the Supreme Court of the United States in this case of *Graves vs. Saline County* in regard to such funding bonds was that, although the original bonds which were funded were absolutely void in the hands of *bona fide* holders, yet the *bona fide* holder of the funding bonds was not bound to investigate and ascertain at his peril as to whether the funding bonds were issued to fund a valid debt of the county, but was protected by the fact that the bonds were negotiable and by the recitals contained therein. After the decision of the Supreme Court of the United States in *Graves vs. Saline County*, 161 U. S., 359, the United States Circuit Court of Appeals for the Seventh Circuit, in obedience to the decision of the Supreme Court of the United States, held in favor of the validity of the said bonds (see *Graves vs. Saline County*, 73 Fed. Rep., 920).

Evansville vs. Dennett. Controlling.

THE PRECISE QUESTION involved in the present case has been passed upon by the Supreme Court of the United States in *Evansville vs. Dennett*, 161 U. S., 434, (1896).

Inasmuch as we also consider this case of *Evansville vs. Dennett*, 161 U. S., 434, to be controlling, we feel justified in stating the same at considerable length, more especially as the Court held in favor of a *bona fide* holder that, though the bonds recited *a particular resolution of the city council by date*, and though such resolution was by law required to appear on the records of the city, nevertheless the *bona fide* holder of such bonds was not even put upon inquiry as to the terms or contents of such resolution, nor of ordinances also referred to in such bonds.

In that case bonds were issued under the provisions of section 30 of the charter of the city of Evansville, Indiana, approved January 27, 1847, which gave power to take stock in any chartered company for making roads to said city (Report, p. 437, bottom, p. 440, bottom). There were two sets of bonds involved in the Evansville case. Those issued to the Evansville, Henderson and Nashville Railroad Company contained the following recital :

"This being one of a series of three hundred bonds of like tenor and date, issued by the city of Evansville, in payment of a subscription to the Evansville, Henderson and Nashville Railroad Company, made *in pursuance of an act* of the legislature of the State of Indiana and ordinances of the city council of said city passed in pursuance thereof."

The other issue of bonds recited as follows :

"*By virtue of an act* of the general assembly of the State of Indiana, entitled 'An act granting to the

citizens of the town of Evansville, in the county of Vanderburg, a city charter,' approved January 27, 1847; and by virtue of an act of the general assembly of the State of Indiana, amendatory of said act, approved March 11, 1867, conferring upon the city council of said city power to take stock in any company authorized for the purpose of making a road of any kind leading to said city; and by virtue of the resolution of said city council of said city, passed October 4, 1869, ordering an election of the qualified voters of said city upon the question of subscribing three hundred thousand dollars to the capital stock of the Evansville, Carmi and Paducah Railroad Company, and said election, held on the 13th day of November, 1868, resulting in a legal majority in favor of such subscription, and by virtue of a resolution of said city council, passed May 23, 1870, ordering an issue of the bonds of the city of Evansville (of which this is a part) to an amount not to exceed three hundred thousand dollars, bearing interest at the rate of seven per cent. per annum, for the purpose of paying the subscription as authorized above. The said city of Evansville hereby acknowledges to owe and promises to pay," &c.

The Supreme Court of the United States held that it must look alone to the charter of 1847 for the power to issue the bonds, saying (p. 440):

"Under this presentation of the case we put aside the acts of 1865 and 1867, as giving no support to the rights of the plaintiff, and look alone to the charter of 1847."

The court then proceeded to state that this charter gave power to subscribe for stock, but only on petition of two-thirds of the residents of the city, &c., as stated in section 30 of the charter, quoted in the Report, page 437, bottom.

The questions certified by the Court of Appeals to the Supreme Court in that case are as follows:

"1. Does the recital in the series of bonds, issued in payment of subscription to the Evansville, Henderson & Nashville Railroad Company, that they were issued 'in pursuance of an act of the legislature of the State of Indiana and ordinances of the city council of such

city, passed in pursuance thereof,' put a purchaser upon inquiry as to the terms of the ordinances under which the bonds were issued?

"2. Does the recital in the series of bonds issued to the Evansville, Carmi & Paducah Railroad Company that they were issued 'by virtue of a resolution of said city council passed May 23, 1870,' put a purchaser upon inquiry as to the terms of that resolution and charge him with knowledge of its terms?

"3. Do the recitals in the bonds issued to the Evansville, Carmi & Paducah Railroad Company, as against a *bona fide* purchaser for value of such bonds, estop the city of Evansville from asserting that such bonds were not issued, for stock subscribed, upon a petition of two-thirds of the resident freeholders of the city, distinctly setting forth the company in which stock was to be taken and the number and amount of shares to be subscribed?

"4. Under the recitals in the bonds issued to the Evansville, Carmi & Paducah Railroad Company was a *bona fide* purchaser for value put upon inquiry to ascertain whether a proper petition of two-thirds of the residents of Evansville, freeholders of that city, had been presented to the common council before that body had subscribed for stock in the said railroad company?

"5. Was a *bona fide* purchaser for value of the bonds issued to the Evansville, Carmi & Paducah Railroad Company charged by the recitals in said bonds with notice that they were issued in pursuance of an invalid act and in pursuance of an election under it, or had such a purchaser a right to assume, from the recital, that the prerequisites of both the valid act and the invalid act had been observed by the common council before the issuance of such bonds?"

The court answered all these questions in favor of the *bona fide* holder. It answered the first, second and fourth in the negative, and the third in the affirmative; and it answered in the negative the first clause, and in the affirmative the second clause, of the fifth question.

The Court, quoting from *School District vs. Stone*, 106 U. S., 183, 187, says (p. 443):

"Bonds issued by municipal officers containing recitals by such officers that the bonds have been issued 'in pursuance of,' or 'in conformity with,' or 'by

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virtue of,' or 'by authority of,' the statute have been held in favor of *bona fide* purchasers for value **to import full compliance with the statute, and to preclude inquiry** as to whether the precedent conditions had been performed before the bonds were issued," citing various cases.

Then, referring to the case in hand, the court adds:

"**As, therefore, the recitals in the bonds import compliance with the city's charter, purchasers for value having no notice of the nonperformance of the conditions precedent, were not bound to go behind the statute conferring the power to subscribe, and to ascertain, by an examination of the ordinances and records of the city council, whether those conditions had, in fact, been performed. With such recitals before them they had the right to assume that the circumstances existed which authorized the city to exercise the authority given by the legislature**" (*Ib.*, p. 443).

We call the special attention of the Court to the fact that the precise question put by the Circuit Court of Appeals to the Supreme Court of the United States in this case of Evansville vs. Dennett, in the first question above quoted, was whether the recital in the bonds that they were issued under "ordinances of the City Council put a purchaser upon inquiry as to the terms of the ordinances under which the bonds were issued." Also, that the second question submitted was whether the recital in the other series of bonds that they were issued "by virtue of a resolution of said City Council, passed May 23, 1870," thus specifying and referring to the resolution by the exact date thereof, "put a purchaser upon inquiry as to the terms of that reso-

lution and charge him with knowledge of its terms."

The Supreme Court of the United States answered both these questions in the negative. In other words, the Supreme Court of the United States has, in this case as in others, distinctly and emphatically laid down the doctrine that, while a purchaser of such negotiable bonds must examine to see if the constitution and statutes of the State confer authority to issue such bonds, and must also examine the form of the bonds and see what appears upon the face thereof, yet if the said bonds on their face conform to the statute and constitution and recite that they are issued "by virtue of" or "in pursuance of," &c., &c., authority of the provisions of a statute, the holder is not bound to go behind the statute conferring the power and ascertain by an examination of the ordinances, resolutions and proceedings of the City Council whether the city has complied with the provisions of the statute, or whether the facts exist which are required by the statute in order that bonds be issued.

Fundamental Principles of the Law of Negotiable Paper as Applicable to this Case.

These and other decisions of the Supreme Court of the United States are made in view of the great and fundamental principle involved in the negotiability of municipal bonds like other negotiable paper. The bonds are designed to pass from hand to hand upon payment of value therefor. The holder must look for constitutional and statute authority for the issue of the bonds, and must look at the bonds that he is buying, but he is not bound to look beyond this if the recitals in the bonds import a compliance with the constitution and statutes. Consider for a moment what an unrea-

sonable and impracticable burden any other rule or principle would put upon the purchaser of municipal bonds. Nobody would be safe in buying them unless he or his attorney went personally and examined all the records of the municipality. In the present case this would have meant that the purchasers of these bonds would have to make a journey across the continent to examine all the records of the municipality. How many bonds would any municipality be enabled to sell if this were the law? The practical effect of any such rule would be to render all negotiable bonds non-negotiable. If a State desires that its municipalities shall not issue negotiable bonds it is very easy for the legislature so to provide; but, as was said by Mr. Justice HARLAN in the case of *Gunnison County Commissioners vs. E. H. Rollins & Sons*, 173 U. S., 255, 276:

"Indeed, it is entirely competent for a State to provide by statute that all obligations, in whatever form executed by a municipality existing under its laws, shall be subject to any defense that would be allowed in cases of non-negotiable instruments. But for reasons that every one understands no such statutes have been passed. Municipal obligations executed under such a statute could not be readily disposed of to those who invest in such securities."

Nothing Peculiar in the Case at Bar as to Keeping Records.

But it may be objected that in the present case the California statute required that "the notice of such election shall recite the indebtedness to be refunded." The court says that the action of the mayor and council was by ordinance, and that such ordinance was a part of the public records of the city, which by its charter are required to be kept "in large, well-bound, uniform and suitable books."

These provisions, however, are not peculiar to the present case. In the *Evansville Case*, 161 U. S., 434, the charter of the city of Evansville (S. L. Ind., 1847, p. 9, § 26) provided, among other things, as follows:

"The common council shall keep a full and fair record of all their proceedings, and for this purpose shall appoint some person not of their body a clerk, who, before entering upon the discharge of his duties as such, shall take an oath of office, and give bond, with security to the acceptance of the common council, to secure the proper performance of his duties. The clerk shall attend all meetings of the council, and make and keep a record of their proceedings; and the minutes of the proceedings of each meeting being recorded, shall be read over in the presence of the council, and if incorrect, corrected, and when found correct, or made so, shall be signed by the mayor, or other presiding officer of the meeting, and attested by the clerk, or other person acting as such.

"SEC. 27. It shall also be the duty of the clerk to safely keep and preserve all records, books, and papers belonging to the city of Evansville, and appertaining to or deposited in his office, entire and without injury or mutilation, and to hand them over, together with all other property of said city in his hands, to his successor, and to do and perform all other things and duties that he may be required to do by the by-laws, ordinances, rules, and regulations to be passed, ordained, and established by said common council: This act shall be deemed and taken to be a public act, and as such may be read as evidence in any court, without being pleaded or particularly referred to in pleading; and the printed by-laws and ordinances passed and ordained by said common council, and purporting to be printed by the order and under the authority of said common council shall be received and read in all courts as *prima facie* evidence, without being specially pleaded or referred to in pleading; and transcripts of the records and proceedings of the said common council, certified by the mayor, under the corporate seal, shall be evidence in all courts, in like manner as the original would be, without other proof or authentication than such certificate and seal."

In the said case of *Evansville vs. Dennett*, 161 U. S., 434, the question presented to the Supreme Court of

the United States was whether the ordinances and resolutions (kept of record under these express provisions of the charter of the city of Evansville above quoted) must be examined by the holder of a bond, which recited that it was issued under or by virtue of the charter of the city of Evansville. The Supreme Court held that the *bona fide* holder of such bond need not make such examination.

Note that in this **Evansville case the very act under which the bonds were issued required full and complete records to be kept.** It is not stated in the opinion of the Supreme Court, nor did that court deem it material to state in its opinion what the ordinances of the city of Evansville would have shown, or what the resolution of May 23, 1870, would have shown to the *bona fide* holders if they had been examined. What the court held was that they **need not be examined for any purpose**, no matter what they contained; that all that the *bona fide* holder of the bond needed to examine was the constitution and statute and the bond.

Furthermore, in the present case the statute of California does not require, as this court erroneously seems to assume, that the ordinance shall set forth the notice of election, nor does it require that the ordinance shall state what indebtedness is to be refunded.

The city council of Santa Cruz, acting strictly in accordance with the statute, might have authorized the giving of notice of election *without setting forth such notice in the ordinance.* The principle, therefore, applies that, even if a bond purchaser were bound to examine the ordinance (and

he is not) or have constructive notice of its contents, yet he *would have constructive notice of only what the statute requires to be stated in the ordinance*, and, therefore, he would not have constructive notice of the notice of election or of anything required by the statute to be stated in the notice of election, such as what indebtedness is to be refunded.

The statutes authorizing the registry and record of deeds, mortgages and other conveyances of lands and prescribing forms of acknowledgment provide that instruments thus authorized to be recorded and recorded, shall be constructive notice. The courts universally hold that if an instrument is not authorized by the statute to be recorded, *actual* recording of it will not be constructive notice to any one. See on this point the numerous cases and authorities on this brief *(infra*, pp. 39-43*)*.

For the same reason, even if the ordinance calling the election in the present case were constructive notice (and it was not), yet the insertion in such ordinance of the notice of election did not make such notice of election constructive notice to any bond purchaser, because such insertion was not provided for or required by the statute.

But even if the California statute had required that the ordinance describe fully what indebtedness was to be refunded, yet in this respect the case would be no different from the ordinary case of an issue of refunding bonds.

The common practice, if not the universal practice, and the common requirement of the statutes in the case of issuing bonds is to set forth in the ordinance the purpose of issue. In numerous cases in the Supreme Court of the United States bonds have thus been issued for an illegal purpose, and the ordi-

nances, resolutions and other proceedings of the municipality if examined would have shown that they were issued for an illegal purpose, but that court has uniformly held that the *bona fide* holder of such bonds is not bound to examine such ordinances, resolutions and other proceedings.

This court, in its opinion in the present case, states:

"On the contrary, the statute itself was clear notice to every person that upon the records of the governing body of the city was required to be entered the specific indebtedness proposed to be refunded."

This, we submit, is clearly an error. What the statute requires in the case of these Santa Cruz bonds is that "the notice of such election shall recite the indebtedness to be refunded," and it is nowhere required that the notice of election shall be spread upon the records. The very reason, therefore, on which this court has attempted to distinguish these cases from the other numerous cases to the contrary decided by the Supreme Court of the United States falls to the ground.

But even if it be assumed that it was required by the statute that the specific indebtedness proposed to be refunded should be set forth in the ordinance or resolution authorizing the bonds, yet the case of *Evansville vs. Dennett*, 161 U. S., 434, where the charter of the city of Evansville expressly required all the ordinances and resolutions to be entered on the records of the city, and the case of *Graves vs. Saline County*, 161 U. S., 359, where, as stated above, the county refunding bond act expressly required the officer to enter upon his record "the description of the bond or evidence of indebtedness for which, or for the purchasing or retiring of which the same was given" (S. L., Ill., 1879, p. 231) expressly hold that a *bona fide* holder of bonds

with recitals such as the present bonds contain *need not examine such ordinances, resolutions or proceedings of the municipality.*

The negotiability of municipal bonds and the conclusiveness of recitals therein in favor of a *bona fide* holder do not depend upon the question whether or not the charter of the municipality or the laws governing the same expressly require that certain records of the municipality be kept. It is the universal practice of municipalities to keep records, and everybody knows this, and courts take cognizance of the fact. Not only so, but in every instance, or in almost every instance, these records are kept under express requirements of the statute, and have been so wherever municipalities have been established. All these facts as to keeping records and as to the requirements of keeping records have been present in every one of the cases where municipal bonds have been held good in the hands of *bona fide* holders, notwithstanding what appeared in the ordinances, resolutions and other records of the municipalities issuing them. It is also safe to say that in every instance, or in almost every instance, a full and careful examination of these records might have disclosed the various illegalities complained of in the defenses set up against the various issues of bonds which have been held valid in the hands of *bona fide* holders. What the Supreme Court of the United States has repeatedly said is that the holder of negotiable municipal bonds with recitals need not examine such records of ordinances, resolutions and other proceedings. Any view which would narrow the negotiability of municipal bonds so as to make it obligatory upon any and every holder to examine the ordinances, resolutions and other proceedings of the municipality misconceives the very

purpose of having such municipal bonds negotiable, which is that the holder of the bond be not obliged to go there and examine all of the ordinances, resolutions and records of the municipality. To this effect are all the decisions of the Supreme Court of the United States.

Wesson vs. Saline County, also in Point in Plaintiff's Favor.

In *Wesson vs. Saline County*, 73 Fed. Rep., 917, in the Circuit Court of Appeals for the Seventh Circuit, the constitution and statutes of Illinois applicable to the bonds there in question authorized a *subscription* to the capital stock of a railroad company, but did not authorize a *donation*. **An examination of the proceedings and orders of the county court of Saline county would have shown to any one that the bonds were issued for a donation.** The precise question was whether the holder of the bonds, with the recitals therein contained, was bound to make such examination. If he was, then the bonds were invalid, even in the hands of a *bona fide* holder. The Circuit Court of Appeals for the Seventh Circuit had formerly decided a number of cases in which they had held such bonds invalid, even in the hands of a *bona fide* holder; but after the decision of the Supreme Court of the United States in the case of *Evansville vs. Dennett*, 161 U. S., 434, the Circuit Court of Appeals for the Seventh Circuit reversed its former decisions, holding them overruled by the Supreme Court of the United States in *Evansville vs. Dennett*, and held that a *bona fide* holder of such bonds, with such recitals, was not bound to examine the records of the county for any purpose, and the bonds were held valid in the hands of such *bona fide* holder.

In a note at the end of the decision, it is stated that "Mr. Justice HARLAN sat at the hearing, but did not participate in the decision."

Thus the Circuit Court of Appeals for the Seventh Circuit had previously held in *Post vs. Pulaski County*, 9 U. S. App., 1, that the **"recital in the bonds that they were issued pursuant to an order of the county court put whosesoever should come into possession of those bonds, even if purchased for value in the open market, upon inquiry as to the terms of that order."** This holding the Supreme Court of the United States overruled in *Evansville vs. Dennett, supra.*

In giving its opinion in the *Evansville case* the Court also says (p. 443):

"As therefore the recitals in the bonds import compliance with the city's charter, purchasers for value having no notice of the non-performance of the conditions precedent, were not bound to go behind the statute conferring the power to subscribe, and to ascertain, by an examination of the ordinances and records of the City Council, whether those conditions had, in fact, been performed. With such recitals before them they had the right to assume that the circumstances existed which authorized the city to exercise the authority given by the Legislature."

This decision of the Supreme Court of the United States, made upon great deliberation, and overruling prior decisions of the Circuit Court of Appeals of the Seventh Circuit from which the *Evansville case* came, shows that the Supreme Court stands by its prior decisions, and it completely negatives the position taken by the City of Santa Cruz when it asserts that the plaintiff, as the *bona fide* holder of the bonds and coupons in question, is put upon inquiry as to the terms of the ordinances, notices and resolutions under

which these bonds were issued, and charged with knowledge of their contents.

Note that the recitals in the bonds in the case of Evansville vs. Dennett were very much weaker than the recitals in the bonds now in question; and yet the Court had no hesitation in arriving at the conclusion that the bona fide holder was protected by even those recitals in the bonds, and was not bound to consult the ordinances and resolutions of the City Council.

After this decision by the Supreme Court of the United States, the case of *Wesson vs. County of Saline*, 73 Fed. Rep., 917, came before the United States Circuit Court of Appeals for the Seventh Circuit. That case was similar to the case of *Post vs. Pulaski County*, *supra*, and the Circuit Court of Appeals said (p. 919):

"**But the proposition enunciated in Post vs. Pulaski County, that 'the recital in the bonds that they were issued pursuant to an order of the County Court put whosoever should come into possession of those bonds, even if purchased for value in the open market, upon inquiry as to the terms of that order,' is inconsistent with, and must be regarded as overruled by the recent ruling of the Supreme Court in the case of City of Evansville vs. Dennett, supra,** where it was held that a recital that a subscription to the stock of a railroad company was 'made in pursuance of an act of the Legislature and ordinances of the City Council, passed in pursuance thereof * * * imported not only compliance with the act of the Legislature, but that the ordinances of the City Council were in conformity with the statute.' That is necessarily so, if the recitals in municipal bonds are not to be denied significance. The only reason for saying that a reference to an ordinance puts a party upon inquiry into the contents thereof is because the reference conveys knowledge of the exist-

ence of the ordinance. But Common Councils, Boards of Commissioners and like municipal bodies can act only by order, ordinance or resolution, as every one is bound to know; and, when a municipal bond is offered upon the market, it needs no mention in a recital to give a proposed purchaser notice that the bond was issued in pursuance of an order, or resolution, or ordinance. The existence of the bond implies that much, and when there is a recital to the effect that the bond was issued in pursuance of a statute, the necessary import is that there was an ordinance, and a proper one, whether express mention is made of it or not. To say, 'in pursuance of a statute and an ordinance,' is equivalent to an express statement that the ordinance is in conformity with the statute, and the purchaser of a bond containing that recital is not bound in that particular to look for further information."

Gunnison County Case Exactly in Point and Controlling.

In the case of *Gunnison County Commissioners vs. E. H. Rollins & Sons*, 173 U. S., 255 (in which case we were of counsel for E. H. Rollins & Sons), it was strenuously urged by Governor THOMAS in his brief and in his oral argument on behalf of Gunnison county that the *bona fide* holder of the Gunnison county bonds there in question was bound to examine the orders of the county commissioners of Gunnison county authorizing the issue of the refunding bonds, and that if he had made such examination he would have seen there a certificate of the county commissioners stating the amount of indebtedness of the county, and showing that it was beyond the limit prescribed by the constitution and statutes of the State. He says (His Brief, p. 40):

"Indeed, our contention is that the purchaser of bonds, or any other form of county indebtedness, *is bound to take notice of every county record open to public inspection* which contains a statement of the county indebtedness, whether it be a warrant register setting

forth the warrants that are issued from day to day, a bond register setting forth the amount of bonds issued from time to time, the semi-annual statements of indebtedness (which are nothing but trial balances struck twice a year), a certificate required to be made before the bonds are issued, *or any other public record of any kind, nature or description* that is open to the inspection of everyone."

We have said above that the Gunnison case is in point and controls the case at bar. This we have said deliberately because the whole defence of Gunnison County in the case was that the bondholder was bound *under the legislation of Colorado to take notice of the records of the county*, and that if such notice was taken the records would show on their face that the county was indebted beyond the constitutional limit, and to this end the defendant county introduced these records in evidence, and the whole stress of the case was whether under the recitals in the bonds a *bona fide* holder thereof was bound to take notice of the records, and the Court held that he was not. In support of his contention Governor THOMAS cited the same cases that are cited in the opinion of this Court in the present case, to wit: The case of *Dixon County vs. Field*, 111 U. S., 83, also the case of *Sutliff vs. Lake County Commissioners*, 147 U. S., 230. Governor THOMAS also cited the general county act of Colorado as to publishing and entering of record a statement of the county indebtedness, which act applied to every county in the State. It applied as much to *Gunnison* county as it did to *Lake* County, the defendant in the case of *Sutliff vs. Lake County Commissioners*. Section 30 of the said statute of the State was as follows:

"An act concerning counties, county officers and county government and repealing laws on these subjects, approved March 24, 1877.

"SEC. 30. It shall be the duty of the Board of County Commissioners of *each county* to make out semi-annual statements at the regular sessions in January and July, at which times they shall have such statement published in some weekly newspaper published in the county, if there be such published; and, if there be no newspaper published in the county, such Commissioners shall cause such statements to be posted in three conspicuous places in said county, one of which shall be the Court House door, and such statement shall show the amount of debt owing by their county, in what the debt consists, what payments, if any, have been made upon the same, the rate of interest that such debts are drawing, also a detailed account of the receipts and expenditures of the county for the preceding months, in which shall be shown from what officer and on what account any money has been received, and the amounts, and to what individuals and on what account any money has been paid, and the amounts; and shall strike the balance, showing the amount deficit, if any, and the balance in the treasury, if any, and the *statement thus made, in addition to being published as before specified, shall also be entered of record* by the Clerk of the Board of County Commissioners in a book to be by him kept for that purpose only, which book shall be open to the inspection of the public at all times *(Session Laws, Colorado, 1877, pp. 218, 227).*"*

Governor Thomas urged (and, of course, correctly on this point) that this Section 30 applied to *every county*, Gunnison County as well as Lake County. He also urged that the debt statements made under this section constituted a public record, of which every bond purchaser had constructive notice. He also argued that all other "records" of the county were constructive notice, especially the orders of the county board of commissioners authorizing the refunding bonds.

* The above section 30 is carried into the General Laws Compilation of 1887 and numbered therein as Section 457 of such Compilation.

This *Gunnison county case* was argued at the bar at great length by a large number of counsel, extra time being given by the court for the purpose, and the Supreme Court finally rendered its decision, in which it held that the Gunnison county bonds were valid in the hands of *bona fide* holders, holding, among other things, that the *bona fide* holder was not bound to examine the orders, proceedings or records of the county, nor the so-called financial statements entered upon the records of the county, although, if he had consulted them, he might have had notice that the refunding bonds were issued to refund invalid warrants. This decision in the *Gunnison county case* proceeds upon the true and correct ground of giving full meaning and effect to the negotiability of the municipal bond and to the recitals therein. This is a distinct decision to the effect that the holder of negotiable bonds is not bound to examine the ordinances, orders, resolutions and other proceedings for the issue of the bonds. The court, in concluding its opinion, says (p. 275) :

"It is insisted with much earnestness that the principles we have announced render it impossible for a State by a constitutional provision to guard against excessive municipal indebtedness. By no means. If a State constitution, in fixing a limit for indebtedness of that character, should prescribe a definite rule or test for determining whether that limit has already been exceeded or is being exceeded by any particular issue of bonds, all who purchase such bonds would do so subject to that rule or test, whatever might be the hardship in the case of those who purchased them in open market in good faith. Indeed, it is entirely competent for a State to provide by statute that all obligations, in whatever form executed by a municipality existing under its laws, shall be subject to any defense that would be allowed in cases of non-negotiable instruments. But, for reasons that every one understands, no such statutes have been passed. Municipal obligations executed under such a statute could not be readily disposed of to those who invest in such securities."

The opinion of the court does not expressly enumerate all the orders, financial statements, records and proceedings which the defendants introduced in evidence over the objections and exceptions of the plaintiff in that case. In regard to these the court says (p. 276) :

"What has been said renders it unnecessary to consider various questions arising upon exceptions to specific rulings in the Circuit Court as to the admission and exclusion of evidence, and as to those parts of the charge to which objections were made. *Those rulings are inconsistent with the principles herein announced.*"

Officers of municipalities charged with the duty of issuing bonds have power to make recitals therein.

It was strenuously urged by counsel for Gunnison County in the case of *Gunnison County Commissioners vs. E. H. Rollins & Sons*, 173 U. S., 255, that county officers had no power or authority conferred either by constitution or statute to make any recital on the question whether the debt limit prescribed by the constitution had been exceeded. It was urged that to permit such power would be to permit a mere officer of a municipality to recite away the provisions of the constitution. But the Supreme Court of the United States distinctly held contrary to this argument, and held such power to exist. There was not in that case any express power conferred either by constitution or statute upon the county officers to make findings and recitals in the bonds, yet the Supreme Court of the United States had no hesitation in holding that such power existed. This power to make the recitals results from the mere fact that these matters are by the statute committed to the officers of the municipality. The constitution and the statutes contemplate that some body of men shall act for and

on behalf of the municipality. There is no other administrative or executive body to represent the city or to speak for it in city matters. They are the agents of the city elected by the people of the city and identified with the city, and the city is bound by their acts and representations made in the performance of the duties committed to them by the statutes. Inasmuch as the city has chosen its own officers and agents, and hold these out to the public as their duly accredited agents and officers, the people of the city, alike by every principle of law and morality, are bound and estopped by the acts and representations of such officers and agents as against innocent third persons with whom they have dealt in city matters. The city and the people of the city held out these officers as representing the city and cannot be heard to assert the contrary.

In order that officers or boards of a municipality may have power to make findings and recitals in bonds it is not necessary that the statutes expressly confer upon such officers or boards power to make such findings and recitals. The fact is, as stated by the Supreme Court of the United States, that "such express direction and authority are seldom found in acts providing for the issuing of bonds." On this point it is enough in this Court to refer to the decision and language of the Supreme Court of the United States in *Bernards Township vs. Morrison*, 133 U. S., 523, 527, as follows:

"It were useless to refer to the long list of cases in which recitals, like these, have been held sufficient to sustain bonds in the hands of *bona fide* holders. It is urged that these commissioners were not elected by the people; that they were not the general officers of the township, but were special officers appointed by the Circuit Court—special agents as it were, for the specific purpose; that the statute does not in terms give them authority to determine whether the pre-

liminary conditions have been complied with; and that this case is, therefore, to be distinguished in these respects from those cases where similar recitals have been held conclusive. But though not the ordinary officers of the township, they were the ones to whom by legislative direction was given full authority in the matter of issuing bonds. The organization of townships, the number, character and duties of their various officers, are matters of legislative control; and it is not doubtful that officers appointed represent the municipality as fully as officers elected. When the legislature has declared how an officer is to be selected, and the officer is selected in accordance with that declaration, his acts, within the scope of the powers given him by the legislature, bind the municipality. But these special commissioners were not the only officers of the township whose acts gave currency to these bonds. If inquiry had been directed to the county and township records the affidavit of the township assessor to the consent required would have been found; and on the face of the bonds it appears that the county clerk of the county has added his official certificate to their validity; so that the acts of general as well as of special officers and agents of the township are the foundation upon which rests the validity of these bonds.

"While it is true that the act does not in terms say that these commissioners are to decide that all preliminary conditions have been complied with, yet such express direction and authority is seldom found in acts providing for the issuing of bonds. It is enough that full control in the matter is given to the officers named. In the case of *Oregon ex. Jennings*, 119 U. S., 74, 92, the rule is thus stated by Mr. Justice BLATCHFORD: 'Within the numerous decisions by this court on the subject, the supervisor and the town clerk, they being named in the statute as the officers to sign the bonds, and the "corporate authorities" to act for the town in issuing them to the company, were the persons entrusted with the duty of deciding, before issuing the bonds, whether the conditions determined at the election existed. If they have certified to that effect in the bonds, the town is estopped from asserting, as against a *bona fide* holder, that the conditions prescribed by the popular vote were not complied with.'

"Whatever may be the hardships of this particular case, to sustain the defenses pressed would go far towards destroying the market value of municipal

securities. We see no error in the ruling of the Circuit Court, and its judgment is therefore affirmed."

Bernards Township vs. Morrison, 133 U. S., 523, 527.

The express and specific recitals in the bonds, as well as the general recitals, estop the city from showing that part of the bonds refunded were not bonds of the city.

The bonds in the present case expressly recite not only that they are

"issued by the said city of Santa Cruz for the purpose of refunding **the bonded indebtedness of said city**" (the exact language of the statute), but also that they are

"issued * * * under and in pursuance of, and in conformity with, the provisions of an act of the legislature of the State of California, entitled," &c.;

and also specifically recite as to the notice of election:

"Notice thereof having been been duly and legally given and published in the manner as required by law."

Under the numerous decisions of the Supreme Court of the United States the *bona fide* holder of these bonds was not bound to look further and to examine the ordinances or notice of election authorizing these bonds. These bonds expressly and specifically recite that they are issued to refund **"the bonded indebtedness of said city."** This recital estops the city from asserting that what was refunded was not "the bonded indebtedness of said city." So also these bonds expressly and specifically recite "**notice**

thereof [that is, of the election] **having been duly and legally** given and published in the manner required by law." This recital also estops the city from showing that the notice of election was not "duly and legally given;" in other words, provided for voting upon refunding such bonds only as the statute authorized to be refunded. So, also, the general recital that the bonds are "**issued * * * under and in pursuance of and in conformity with the provisions of an act entitled,**" &c., estops the city from showing that the provisions of that act were not followed in issuing the bonds, as respects the bonds refunded, being city bonds, as well as in all other respects.

Vote of the People of the City and its Legal Effect.

The question was submitted pursuant to the Refunding Act of March 1, 1893, to a vote of the people of the city whether or not the indebtedness represented by the Water Company bonds, assumed by the city, as well as the other bonds of the city, should be refunded by the issue of the very bonds now here in question, and the people, at an election held on Tuesday, March 13, 1894, by a vote of 735 votes "for refunding the indebtedness" (including these Water Company bonds assumed by the city as fully set forth in the notice of election) and 22 votes against the same, voted in favor of refunding said bonds (Record, p. 395). The question put to the qualified electors was distinctly whether the city should issue bonds of said city under the provisions of the said refunding act of the State of California, that is, issue *negotiable* bonds, which should pass from hand to hand by delivery and

come, as these bonds have, into the hands of innocent holders for value. Afterwards, pursuant to, and expressly authorized by, such vote of the people, the city council issued the funding bonds now in question. When it comes to a question which should suffer, if the act of voting and issuing the bonds was illegal, there can be but one answer, either under strict law or moral justice: the city, and not the innocent holders of the bonds.

If the City ever intended to question or repudiate, or attempted to question or repudiate, these bonds of the water company which the city had assumed on the purchase of the water plant, that would have been the time for it to do so; but, instead of doing so, the people of the city, by their vote, with practical unanimity, agreed that this bond indebtedness should be paid as the bonds of the city, and that refunding bonds should be issued therefor.

We may here pause to quote from the language of the late Chief Justice of the Supreme Court of the United States in the somewhat similar case of *Jasper County vs. Ballou*, 103 U. S., 745—language which is especially pertinent to the facts just stated. Mr. Chief-Justice WAITE, giving the unanimous opinion of the court, there said (p. 751):

"When, therefore, the people were called on to vote whether the old bonds should be funded, the facts they had to consider were these: A valid law authorizing the subscription and an issue of the bonds had been passed. The people, at an election which had been irregularly called, had voted to make the subscription and issue bonds bearing ten per cent. interest, and all payable within six years. An act had been passed to legalize the election, and under it the subscription which had been voted was made, and bonds such as were contemplated had been issued and were then outstanding in the hands of various parties. Whether these bonds were valid was, so far as any direct de-

cisions were concerned, an open question, and certainly not free from doubt. Under these circumstances the question was directly put to the people of the county, in a manner authorized by law, whether they would recognize these bonds as 'binding and subsisting legal obligations,' and issue in lieu of them other bonds having twenty years to run and bearing seven per cent. interest instead of ten; and they, by their vote, said they would. There is no complaint of any illegality in this election, or of fraud or imposition. So far as the record shows, the proposition to fund went from the county authorities to the bondholders, and not from the bondholders to the county. The facts were as well known to one party as the other. If the people intended to rely on their defenses to the old bonds, then was their time for them to speak and by their vote say they would not recognize them as binding obligations. By voting the other way, they, in effect, accepted them as legal and subsisting for the purposes of the proposed extension of time at reduced interest, and said to the holders, if the proposition was accepted, no question of illegality would be raised. Their offer having been accepted, they are now estopped from insisting upon an irregularity which they have by their votes voluntarily waived, with a full knowledge of the facts. The case is clearly, as we think, within the principle acted on by the Supreme Court of the State in *President and Trustees of the Town of Keithsburg vs. Frick*, 34 Ill., 405. **As was very properly said below by the learned circuit judge 'there must be an end of these contests and defenses some time or other.' There must be a time when the people in their political capacity are concluded by their contracts as much as individuals, and we think that where the people of a county, at an election held according to law, authorize their corporate or political representatives to treat certain outstanding county obligations as 'properly authorized by law' for the purpose of negotiating a settlement with the holders, and the settlement which was contemplated has been made, all contests as to the validity of the obligations must be considered as ended.**

"This disposes of all questions as to the excessive issue of bonds. For all the purposes of this case the original bonds must be taken as binding. The issue of the funding bonds did not increase the aggregate of

the indebtedness of the corporation, but only changed its form."

So, also, the language of the Supreme Court in the case of *Graves vs. Saline County*, 161 U. S., 359, is likewise especially pertinent. Mr. Justice SHIRAS, giving the unanimous opinion of the Court, there says with regard to certain refunding bonds of Saline County (in that case refunding void bonds) (p. 374):

"But when, in pursuance of the funding laws, the question whether the outstanding original bonds issued to the Belleville and Eldorado Railroad Company should be refunded in new bonds was submitted to the same constituent body that authorized the original issue, and when, in accordance with the vote so taken, and in formal compliance with the other directions of the funding laws, negotiable securities were issued and delivered in payment of the outstanding bonds, we know of no principle of law which forbids the county of Saline from such honorable discharge of its liabilities in the hands of innocent holders."

These decisions of the Supreme Court of the United States in the cases above referred to harmonize with the general doctrines and principles of the law as to negotiable paper and as to constructive notice.

No ordinance, notice of election or any "record" is constructive notice as to any negotiable paper unless a statute expressly so provides, and there is no such statute in California.

The proposition that the ordinance and notice of election are constructive notice to every holder of bonds as against the contrary specific and positive recitals in such bonds, and that they are constructive

notice in the absence of any statute which so provides recital or no recital, seems to us to be an alarming and revolutionary principle in regard to negotiable instruments for the payment of money. The general principle, we take it, is well settled that, in order to render a thing constructive notice, some statute must so provide. This is the principle laid down by the Supreme Court in the case of *Burck vs. Taylor*, 152 U. S., 634, 654 :

"If notice was essential to charge them, actual notice should have been given, at least in the absence of any statute providing some means for constructive notice."

The principles and rules as to constructive notice have had an extensive application in regard to conveyances of real estate in this country. The statutes of most, if not all of the States, expressly provide for a public office, known as the registry of deeds, where conveyances of real estate may be recorded. Such office is provided with books and indexes and is open to the public at all times, and any person interested may go and examine such books ; and these statutes *in all cases* further expressly provide that the record of an instrument, duly executed and duly acknowledged, shall be constructive notice of such instrument to all subsequent purchasers of the real estate affected thereby. The opening of the public office and the recording of these deeds without such provision that the deeds so recorded shall be constructive notice would have no effect as giving constructive notice to any one. This is evident from the numerous decisions of the courts to the effect that where a deed is improperly recorded (as, for example, where it has been improperly acknowledged), the record of it in the public records is not constructive notice to a subsequent purchaser. Why ?

Because in the absence of a statute which expressly so provides such record is not constructive notice.

In 20 American and English Encyclopædia of Law, page 600, summarizing the established rule of law, it is said:

"If an instrument is either not authorized by law to be recorded, or is not authorized to be recorded by reason of its defective execution or the failure to comply with the prerequisities to recordation, its enrollment on the records is of no effect, and it cannot be said that it will charge with constructive notice."

In *McEwen vs. Den*, 24 How., 242, the Court said (p. 244):

"The deed offered in evidence was recorded without legal proof of its execution, and, therefore, a copy of the record could not be evidence. The Court erred in admitting the copy to go to the jury."

In *Olcott vs. Bynum*, 17 Wall., 44, the Court said (p. 59):

"The original deed from Hovey to Olcott and Stephenson never having been registered, *and the registration of the copy being unauthorized*, it follows that the certified copy of the registered copy was a nullity, and could give no legal right to the grantees which the Circuit Court could recognize."

In *Buel vs. Irwin*, 24 Mich., 145, the Court said:

"Apart from the curative act of 1861, this certificate was plainly insufficient to authorize the deed to be recorded. To entitle a deed to registry, its execution by the grantor must be proved or acknowledged, and when acknowledged the evidence of the acknowledgment of execution by the grantor must appear by the certificate, and if the acknowledgment is taken abroad, before a Michigan Commissioner, his certificate must be authenticated by his seal. In this case, the certificate does not show that the grantor acknowledged that *he* executed the deed, and, hence, if otherwise regular, the certificate would be bad, and the proof of execution of the deed, required by the statutes as a prerequisite to registry, would be wanting (*Haden vs. Westcott*, 11 Conn., 129)."

In *Ely vs. Wilcox*, 20 Wis., 523, the Court held that, for want of a certificate of a Clerk that the notary taking the acknowledgment was such, and that his signature was genuine, the deed was not authorized to be recorded, and was, therefore, not notice to any one. Other decisions are cited in a note to this case in 91 Amer. Dec., 436.

Mr. Wade says: "The requirements of the statute, both in regard to the official character of the acknowledging officer and the contents of his certificate, must be complied with in every substantial particular, or the record of the instrument will be inoperative as constructive notice."

Wade on Notice, 2d Ed., Sec. 124.

In *St. John vs. Conger*, 40 Ill., 535, the Court said:

"It is insisted that the record of the copy of the deed from Madison County was sufficient to put subsequent purchasers upon inquiry. *To hold that parties ought to have been put upon inquiry by this record would be precisely the same thing as holding them affected with notice.* This would be giving to the record of an instrument, not entitled to be recorded, the same force as to notice that we give to one legally reduced to record. We do not think any authority can be found in support of this proposition. On the contrary, the familiar rule, and one laid down by this Court, is that the record of an instrument not entitled by law to be recorded is of no avail as notice (*Moore vs. Hunter*, 1 Gilm., 317). It is said that a purchaser, as a matter of fact, receives the same information from the record of a copy as from the record of an original instrument. That may be true. But the broad difference is this: The statute only authorizes the record of original instruments, and it makes that record conclusive evidence of notice. It matters not that a subsequent purchaser has not, as a matter of fact, seen the record. If the instrument has been legally recorded, the law presumes him to have seen it, and holds him to the consequences of such knowledge. Not so as to the registry of a copy. It may be that if a party can be clearly proven to have read the record, he should be held to have derived from it the same degree of actual knowledge that he would have derived from seeing a copy of an instrument in the hands of a

private individual. He might be considered as put upon inquiry. But the law does not presume him to have read the record of an instrument not authorized to be recorded. In the case before us there is no evidence that the defendant, and the intermediate parties through whom he claims from the heirs of McNemony, had actual knowledge of the record of the copy or had ever seen such record."

If such deeds *actually upon the registry* (but not entitled to be there) are not constructive notice to a person who confessedly has constructive notice of whatever is required to be there, much less is the notice of election in the present case constructive notice to any one, for no one need examine the ordinance to see the notice of election, as the statute does not require the ordinance to set forth the notice of election.

It is true that ordinarily the purchaser of a piece of *real estate* must take notice of any judgment and litigation in the courts of general jurisdiction affecting the title to such real estate. But real estate is property *not negotiable according to the law merchant*, and an entirely different rule prevails with regard to judgments or litigation affecting negotiable instruments.

How free negotiable paper is from any "*constructive* notice" is seen from the following, to wit:

The purchaser of negotiable paper is not bound to take notice (that is, does not have constructive notice) of any litigation pending, or any judgments which may have been previously rendered regarding such negotiable paper.

This principle has been repeatedly decided by the courts.

That a pending suit, or a judgment in any suit regarding negotiable bonds, is not constructive notice to a *bona fide* purchaser thereof was well settled by the Supreme Court upon great consideration in the case of *County of Warren vs. Marcy*, 97 U. S., 96. That court states as follows the question there presented (p. 105).

"This brings us to the second question; namely, whether the pendency of the chancery suit for vacating the proceedings of the supervisors, and preventing the issue of the bonds in this case, was in itself constructive notice to all persons of their invalidity, or of the objections raised against them. This question has an important bearing upon the case, for, whilst the bonds may be valid in the hands of a *bona fide* purchaser before maturity, and without notice of any defect or vice in their origin, this cannot be said in reference to one who has such notice, or who is chargeable therewith."

The court, after full consideration of the matter and review of the numerous authorities, answered that question in the negative.

So, also, the Supreme Court, in the case of *Carroll County vs. Smith*, 111 U. S., 556, said (p. 562):

"The defendant in error was no party to that suit, and the record of the judgment is therefore no estoppel. The bonds were negotiable, and there was, therefore, no constructive notice of any fraud or illegality by virtue of the doctrine of *lis pendens* (*County of Warren vs. Marcy*, 97 U. S., 96)."

See, also, to the same effect:

Orleans vs. Platt, 99 U. S., 676.

Cass County vs. Gillett, 100 U. S., 585.

Thompson vs. Perrine, 103 U. S., 806.

1 DILLON *Munic. Corp.*, 4th Ed., Sec. 514, and cases cited in State as well as Federal courts.

There is also another principle which is especially pertinent to the present case.

Where it is sought to affect the bona fide purchaser for value of commercial paper with constructive notice, the question is not whether he had the means of obtaining or might have obtained by prudent caution the knowledge in question, but whether not obtaining was an act of gross or culpable negligence.

On this subject we refer to the decision of the Supreme Court in the case of *Wilson ex. Wall*, 6 Wall., 83, where said Court approved the well-known judgment of Lord Chancellor CRANWORTH in *Ware ex. Lord Egmont*.

This doctrine applies especially to cases of negotiable paper (*Goetz ex. Bank of Kansas City*, 119 U. S., 551, 560).

Applying this principle to the present case, it is perfectly obvious that a person purchasing one of the bonds now in question, with its specific and positive recitals that these bonds are "issued by the said city of Santa Cruz for the purpose of refunding *the bonded indebtedness of said city*," is not guilty of gross or culpable negligence, or of any negligence whatever, in not looking up all of the records of said city before purchasing the bonds, or in believing and relying on the recital that what was refunded was "*the bonded indebtedness of said city*."

Even if it were to be assumed and held that a purchaser of negotiable bonds without any recitals would have constructive notice of the ordinances, resolutions and notices of election and would be bound at his peril to examine the same before purchasing the bonds (and if this were held to be so in the absence of any statute which provides that such ordinances, resolutions, and notices of election shall be constructive notice—a holding which we believe to be clearly erroneous), yet the recitals in the bonds would in such event constitute an estoppel, precisely on the same principle that an estoppel may and frequently does exist in respect to the title of real estate.

The statutes of most of the States provide for records of deeds and mortgages and other instruments of conveyance of land, and that such records shall be constructive notice to all subsequent purchasers. Nevertheless, the courts uniformly hold that a person may estop himself from relying upon the constructive notice which such records furnish.

This was held in a case in New York in regard to a municipal corporation. *Trustees, &c., of Town of Brookhaven vs. Smith*, 118 N. Y., 6. There the town had passed certain resolutions recognizing the title of the land in Smith, whereas the records showed that the title was not in Smith, and the Court of Appeals held that the town was estopped to assert or rely upon the record title. The court says (p. 641):

"The authorities in this state are all harmonious on the subject of estoppel *in pais*.

"When a party, either by his declarations or conduct, has induced a third person to act in a particular manner, he will not afterwards be permitted to deny

the truth of the admission if the consequence would be to work an injury to such third person or to some one claiming under him (*Wendell vs. Van Rensselaer*, 1 Johns. Ch., 344, 354; *Storrs vs. Barker*, 6 *id.*, 166; *Town vs. Needham*, 3 Paige, 545; *Dezell vs. Odell*, 3 Hill, 215; also see dissenting opinion of Judge BRONSON approved in 47 N. Y., 500; *Brown vs. Sprague*, 5 Denio, 545; *Plumb vs. Cattaraugus C. M. Ins. Co.*, 18 N. Y., 393; *Welland Canal Co. vs. Hathaway*, 8 Wend., 483; *Thompson vs. Blanchard*, 4 N. Y., 303; *Cent. Nat. Bk. vs. Nat. Bk. Commonwealth*, 50 *id.*, 575; *Armour vs. M. C. R. R. Co.*, 65 *id.*, 111-122; *N. Y. Rubber Co. vs. Rothery*, 107 *id.*, 310 316).

"Numerous cases where this principle has been applied to real estate are collected in Washburn on Real Property (vol. 3, chap. 2, sec. 6), to which reference is made. When so applied it is as effectual as a deed would be from the party estopped.

"The general rule deduced from all the authorities is that if once is induced to purchase land by the acts or representations of another designed to influence his conduct, and creating a reasonable belief on his part under which he acts that he is thereby acquiring a valid title to the same, the party who thus influenced him is estopped from setting up his own title, existing at the time of the purchase, against that of the purchaser.

"The various declarations of the town through the trustees and town meetings must be construed as a single representation. They were all *in pari materia*, and had one purpose — viz., to inform Smith that the town made no claim to the land he desired to purchase."

To hold that the ordinances, resolutions and notices of election can be introduced as evidence to overthrow the estoppel produced by the recitals in the bonds is for the City to invoke and use the doctrine of constructive notice to perpetrate a fraud. But Courts never permit this doctrine to be invoked for any such purpose.

This is a principle that will forever stand in the way of any person, whether natural or artificial, retracting such representations as those made in these bonds.

The question of fact as to whether the indebtedness which was being renewed by these refunding bonds *were valid bonds of the City was one peculiarly within the knowledge of defendant.* The purchaser of the bonds had no actual knowledge on the subject. He trusted to and relied upon these representations. The agents of the City, who made the representations, either *willfully falsified* or recklessly certified to that which they did not know, which was little better. The doctrine of the *Sutliff case*, as applied to any recitals in those bonds is one thing (even if that case really has any great importance after the decisions in *Evansville vs. Dennett* and *Gunnison County vs. Rollins, supra*), but the application of it to overthrow the recitals in these bonds would be another matter. What were these recitals made for ?

The city officers knew that these bonds would go on the market and would pass from hand to hand for value. They knew that these representations would give currency to the bonds. They knew they would reach the hands of men who would place their money in them as an investment. Now to allow defendant to allege the falsity of these representations would be to allow it to perpetrate a fraud—an *actual, willful and monstrous fraud.* This has never before been tolerated by a Court of justice. The recital of facts which the Courts have allowed to be disputed have related to facts implied rather than expressed. They were not recitals which, in their nature, were fraudulent, if false. The doctrine of constructive notice can never be invoked as an aid to the perpetration of a willful fraud. It is a doctrine used to balance and adjust equities where no fraud is intended. Suppose a man has a deed on record, but, for the purpose of defrauding a third party, tells him that his grantor has a per-

fect title, and induces him to buy the property. Will the doctrine of constructive notice aid in the fulfillment of the fraud? Certainly not. But where is there any difference, in principle, between the case supposed and the case at bar? These representations were with reference to definite, specific facts. There is no pretense that a *mistake* was made. They were calculated to *deceive*. A man is presumed to intend the natural results of his acts. They were of such a character that if—as is now claimed—they were absolutely false, they must be pronounced willfully *fraudulent*. Let us see what the Courts have said upon this subject.

In *Converse vs. Blumrich*, 14 Mich., 109, the Court said:

"The laws of constructive notice can never be so applied as to relieve a party from responsibility for *actual misstatements and frauds*."

In *Groton Savings Bank vs. Batty*, 30 N. J. Eq., 126, the Court said:

"The principle [that the possession of land is notice to others of the possessor's title] which the Lathrops invoke is intended for a shield to protect the equitable rights of those who are entitled to the consideration of equity. It will not be available as a *cover of fraud* nor will it be applied against equity."

In *Wild vs. Gibson*, 1 H. L. Cas., 605, the Court said:

"Constructive notice is resorted to from the necessity of finding a ground of preference between equities otherwise equal, but cannot be applied in support of a charge of *direct personal fraud*."

See, also, *Gill vs. Hardin*, 48 Ark., 412.

In *Stone vs. Covell*, 29 Mich., 359, the Court said:

"We have heretofore held that a man is bound by his positive and unequivocal assertions of fact, and bound to made good the consequences of their false-

hood. And when he asserts as true what he has reason to believe false, and gives no qualification to show that he is not speaking positively and from knowledge, we think there is no sense or justice in exempting him from responsibility (*Converse vs. Blumrich*, 14 Mich., 109; *Beebe vs. Knapp*, 28 Mich., 53; *Beatty vs. Lord Ebury*, L. R., 7 H. of L., 102)."

The principle of constructive notice is always resorted to in order to prevent the person having it from doing an act to the injury of another, and does not apply where the question is whether one was barred by his assent to a *fraud practiced on him* (*Spencer vs. Spencer*, 3 Jones Eq., 404).

The defendant in this case is pleading its *own fraud*. It is asking to be permitted to show that its positive statements of facts *were false*—not false by mistake, but *willfully false*. It does this upon the flimsy pretext that it had made another record, at another time, from which, if the purchaser of these bonds had examined it, he would have ascertained that this latter statement was false. Even if this conclusion, as to what the former record would show, were correct, we deny that the fraud can be evaded in that way. This former record could only give constructive notice, and that is inadequate to repel a positive fraud.

Back of these recitals was an order entered of record prescribing what the bond should recite (Record, p. 142). Suppose there was some conflict between these records. Which was a purchaser entitled to believe? The recital was the later record. It was *specific and certain* as to the bonds being issued to refund "bonded indebtedness of said city." It related to a matter not only peculiarly within the knowledge of defendant, but one that it was its *duty* to investigate.

As to this question of fraud, it will not do to try to

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make a scapegoat of the City Council and plead the innocence of the people of this city. The people voted these bonds under a notice of election, specifying and describing the bonded indebtedness to be refunded. The procedure of the council was all entered of record. The whole transaction was open and public. During the period that these bonds, containing these recitals, were being issued, no taxpayer came forward and objected to their issuance or to the recitals they contained.

Public Policy Requires that the Negotiable Character of Municipal Bonds be Fully Maintained.

The character of municipal bonds as negotiable securities has been well settled by scores of decisions in the Courts. As such negotiable securities, easily marketable, passing from hand to hand, they constitute a desirable and convenient investment for money. The importance of preserving to its fullest extent the negotiable character and standing of such securities is fully as great to the municipalities themselves as to the purchasers of such securities. It is their negotiability that is the chief element of their desirability as an investment, and that has resulted in the reduction of the interest on these securities to the present low rates. But once let it be understood among the investing community, who constitute the market for these municipal bonds, that such securities are not negotiable, but that a purchaser of them—it may be in the City of New York, or Boston, or Philadelphia, or Washington, or Chicago—must himself take a journey to Santa Cruz, California, and search out records that existed five, ten, twenty or even thirty years before

his contemplated purchase of bonds, and inform himself in regard to all those records before he completes his purchase—we say, once let this be understood, and the market for municipal securities is gone. We do not believe that this Court will give its assent to any such doctrine, or that it is going to hold that a notice of election or an ordinance of the city is *constructive* notice to all the world, affecting the city's negotiable bonds, into whosesoever hands they may come, and also can be used as a defense against bonds in the face of the specific and solemn recitals therein contained. Such is not the doctrine of the Supreme Court of the United States. On the contrary, that Court has expressly stated and held in *Evansville vs. Dennett*, 161 U. S., 434, *supra* (p. 443):

"As therefore the recitals in the bonds import compliance with the city's charter, purchasers for value having no notice of the non-performance of the conditions precedent, were not bound to go behind the statute conferring the power to subscribe, and to ascertain, by an examination of the ordinances and records of the City Council, whether those conditions had, in fact, been performed. **With such recitals before them they had the right to resume that the circumstances existed which authorized the city to exercise the authority given by the Legislature.**"

So also, in *Marcy vs. Oswego Township*, 92 U. S., 637 (the leading case in respect of the effect of an *over-issue* of bonds where the limit is fixed by statute), the recital was as follows (p. 639):

"This bond is executed and issued by virtue of and in accordance with an act of the Legislature of said State of Kansas, entitled 'An act to enable municipal townships to subscribe for stock in any railroad, and to provide for the payment of the same, approved Feb. 25, 1870,' and in pursuance of and in accordance with

the vote of three-fifths of the legal voters of said Township of Oswego, at a special election duly held on the seventeenth day of May, A. D. 1870."

The Court says that the bonds are valid:

"Unless they were voted and issued in excess of the amount authorized by the act. It became, therefore, a question whether in this suit, brought by a *bona fide* holder for value to recover the amount of some of the coupons, it could be shown, as a defence to a recovery, that at the time of voting and issuing the series of bonds the value of the taxable property of the township was not in amount sufficient to authorize the voting and issuing the whole series, amounting to $100,000."

The Court held that such defense could not be made; and, on this point said (p. 641):

"So, also **the subsequent issue of the bonds containing the recital above quoted**, that they were issued 'by virtue of and in accordance with' the legislative act, and 'in pursuance of and in accordance with the vote of three-fifths of the legal voters of the township,' **was another determination not only of the result of the popular vote, but that all the facts existed which the statute required, in order to justify the issue of the bonds.**"

II.

We respectfully submit that this court erred in holding that the city of Santa Cruz did not have as "an outstanding indebtedness evidenced by bonds" the bonds of the water company issued under and secured by the water company's mortgage. The city of Santa Cruz had purchased the plant of the water company subject to the mortgage securing the said bonds, and also

assuming and agreeing to pay the said bonds, and therefore the city of Santa Cruz had these bonds as "an outstanding indebtedness evidenced by bonds" within the meaning of the act of March 1, 1893 (Stat. 1893, p. 59), authorizing the issue of refunding bonds.

Section 1 of the Statute of California authorizing the issue of refunding bonds provides:

"Whenever any incorporated city or town other than cities of the first-class in this State has an outstanding indebtedness evidenced by bonds and warrants thereof, the common council, board of trustees or other governing body thereof shall have power to submit to the qualified electors of such city or town, at an election to be held for that purpose, the question of refunding such indebtedness," &c.

The proposition that we here state is that, inasmuch as the city of Santa Cruz purchased the water company's plant subject to the mortgage made by the water company, and assumed and expressly agreed to pay the said water company's bonds, the city of Santa Cruz thereby became indebted for and bound to pay the said bonds, the city thus becoming the principal debtor upon the said bonds. The deed from the water company to the city expressly provides as follows (Record, p. 346):

"Subject, however, to said mortgage or deed of trust and all the obligations thereby imposed, which bonds, mortgage or deed of trust and obligations the party of the second part [the city of Santa Cruz] agrees to pay and perform."

This deed was received and accepted by the city, and filed for record by the city clerk (Record, p. 348).

We submit that on these facts it is clear, within the numerous decisions of the State of California, that the

city of Santa Cruz became primarily liable for the payment of the bonds of the water company.

In the case of *Williams vs. Naftzger*, 103 Cal., 438, the court says (p. 440):

"An agreement on the part of a grantee to pay and discharge a mortgage debt upon the granted premises, for which his grantor is liable, renders the grantee liable therefor to the mortgagee, and in an action for the foreclosure of the mortgage, if the mortgaged premises are insufficient to satisfy the mortgage debt, judgment may be rendered against him as well as against the mortgagor for the amount of such deficiency. This liability results from the familiar doctrine in equity that a creditor is entitled to the benefit of all securities or collateral obligations that his principal debtor may have given to the surety for the payment of the debt. By the conveyance of the mortgaged premises and the assumption of the mortgage debt by the grantee, the latter, as between him and his grantor, becomes primarily liable to the mortgagee, and his vendor becomes his surety (*Halsey vs. Reed*, 9 Paige, 452; *Crowell vs. Currier*, 27 N. J. Eq., 154; *Crawford vs. Edwards*, 33 Mich., 354; *Keller vs. Ashford*, 133 U. S., 622; *Biddel vs. Brizzolara*, 64 Cal., 354; Jones on Mortgages, secs. 741, 752)."

So, also, in the case of *Alvord vs. Spring Valley Gold Company*, 106 Cal., 547, a California corporation had taken a deed executed by another corporation subject to indebtedness of the grantor corporation secured by a certain mortgage therein mentioned. The court says (p. 552):

"The deed referred to contains an unequivocal recognition of the mortgage in question as a valid and subsisting obligation and lien on the property, and a promise to pay it as a part of the consideration for the conveyance. It is settled by an almost unanimous line of decisions in this country, approved by all text writers, that such a recital in a deed, even when the deed is not executed by the grantee, is conclusive evidence in favor of the mortgagee and against the grantee in the deed of the existence and validity of the mortgage."

In *Weaver vs. McKay*, 108 Cal., 546, a conveyance was made subject to a certain mortgage which the grantees therein assumed and agreed to pay. The court held that the grantees thereby assumed payment of the mortgage debt, and became liable to pay judgment for deficiency if the land did not sell for enough to pay the debt.

In *Hopkins vs. Warner*, 109 Cal., 133, the court says (p. 136):

"By the purchase of the mortgaged premises, and the agreement on the part of the purchaser to discharge the mortgage debt, there results, as between the mortgagor and his grantee, a substitution of the liability to the mortgagee, by which the grantee becomes the principal debtor to the mortgagee, and the liability of the mortgagor merely that of a surety for his grantee. This agreement of the grantee to discharge the mortgage debt is an obligation in the hands of the mortgagor, which the mortgagee may enforce for his own benefit when he seeks to obtain satisfaction of the mortgage debt, to the same extent that it could be enforced by the mortgagor."

So, also, in *Tulare County Bank vs. Madden*, 109 Cal., 312, the deed of conveyance recited a mortgage, and that the second party "assumes and agrees to pay the said amount due thereon." The court held that the grantee was liable on the mortgage as the principal debtor, and that a deficiency judgment was properly rendered against him on the foreclosure of the mortgage.

To the same effect see *Keller vs. Ashford*, 133 U. S., 610.

See, also, on this point JONES on *Mortgages*, 5th edition, section 749 *et seq.*

In order that the grantee may be personally liable to

pay the mortgage debt, it is not necessary that he should sign the deed or any obligation.

JONES on *Mortgages*, section 752, states this matter as follows:

"To create a liability on the part of the grantee to pay an existing mortgage, it is not necessary that he should sign the deed or any obligation; his acceptance of a deed imposing this obligation upon him is all that is necessary."

See also on this point the several California cases above quoted.

For these reasons we say that the bonds and mortgage of the water company, thus assumed and agreed to be paid by the city, did in fact and in law constitute "an indebtedness of the city evidenced by bonds thereof" within the meaning of the refunding statute.

Let us consider the position taken by the city as respects this alleged defense to the refunding bonds. The proposition of the city is that any purchaser of the refunding bonds, if he had examined the ordinance calling the election and the notice of election, would have seen on the face thereof that the city was refunding these bonds of the water company which the city had expressly assumed and agreed to pay, which fact of assumption and agreement to pay is stated upon the face of the said ordinance and notice of election. The ordinance calling the election refers to these water bonds as follows (Record, p. 129):

"Which said bonds outstanding were, at the time of the conveyance by the City Water Company of Santa Cruz to the city of Santa Cruz, of the property known as the city water works, and now are, a valid lien and charge upon said property known as the city water works, and became thereby a part of the bonded indebtedness of the city of Santa Cruz."

Consider what impression and information this statement would give to a proposed purchaser of the refunding bonds if he had examined such ordinance and notice of election. It seems to us clear that any one reading this statement in the ordinance, be he layman or lawyer, would come to precisely the same conclusion regarding the matter as the Supreme Court of California, as stated in the numerous cases above quoted, namely, that the city of Santa Cruz became thereby primarily indebted to pay the bonds of the water company. This is the fair, practical and common sense view of the matter. It is a view which deals with the substance and real legal effect of the transaction, whereas the view taken by the city is one which can only be adopted, if at all, by raising and finding an artificial distinction and not looking at the real substance of the matter.

Bear in mind, moreover, that this is a defense which is sought to be raised against the *bona fide* purchaser of the refunding bonds. As we have shown in our argument, Point I., *supra*, the question whether a *bona fide* purchaser is to be held affected with notice of any illegality is to be determined by an examination of the question whether such *bona fide* purchaser was negligent or guilty of bad faith in making his purchase. Applying this test in the present case, it is perfectly obvious that no proposed purchaser of the refunding bonds would be guilty of any negligence or bad faith in purchasing the said bonds, even if he had seen or read the ordinance and notice of election authorizing the same. This ordinance would have informed him that the city was issuing these refunding bonds to refund in part bonds issued by the water company, but it would also have informed him that these bonds had, by the conveyance of the property by the Water Company, sub-

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ject to the mortgage, the city agreeing to pay the bonds, become in law and in fact a part of the bonded indebtedness of the city.

The question whether these water bonds of the city of Santa Cruz had become a part of the bonded indebtedness of the city was a question which the city council must necessarily determine before issuing the bonds. They made and set forth in the ordinance calling the election their finding that the said bonds had "become thereby a part of the bonded indebtedness of the city of Santa Cruz." This finding of the council was in itself a decision by the tribunal appointed by the refunding act to pass upon the question of issuing the refunding bonds. This decision involved a mixed question of law and fact, and the decision of this appointed tribunal is, under the numerous decisions of the Supreme Court of the United States, conclusive as respects the holder of the refunding bonds. Any other conclusion would involve the proposition that whenever indebtedness is refunded the proposed purchaser of the refunding bonds must go back and trace the indebtedness to its beginning and ascertain at its peril whether the said indebtedness is in all respects valid.

For these reasons we submit that, even if this court shall be of opinion that the holder of the refunding bonds had constructive notice of the ordinance calling the election, and also of the notice of election, which, however, we respectfully submit and show, under point I. of this brief, is contrary to the numerous decisions of the Supreme Court of the United States, yet the holder of such refunding bonds, if he had read such

ordinance and notice of election, would not have received notice of any illegality in the issue of the bonds, and would not have been guilty of any fraud or bad faith in taking the refunding bonds. On the contrary, he would have been informed and assured by the solemn recital made by the city council of Santa Cruz that the water bonds had "become a part of the bonded indebtedness of the city of Santa Cruz." Even under this view, therefore, the holder of these refunding bonds is entitled to recover in this action.

Conclusion and Concluding Suggestion.

We have submitted the foregoing argument to this court, in the full confidence that this court will be able to arrive at the conclusion that the bonds in question, with the recitals contained therein, are valid in the hands of the plaintiff, the *bona fide* holder thereof. If, however, this court shall, upon a full and careful consideration of the matter, and of the cases in the Supreme Court of the United States referred to in this brief, not be able to arrive at such conclusion, then we respectfully suggest, for the consideration of this court, whether it might not deem it appropriate to certify to the Supreme Court of the United States the questions involved in this case, following in this respect the practice under which questions affecting the validity of bonds have been certified to that court by the Circuit Courts of Appeals in the cases of *Graves vs. Saline County*, 161 U. S., 359, and *Evansville vs. Dennett*, 161 U. S., 434, and in many other similar cases.

Inasmuch as the questions and principles necessarily involved in this case are of transcendent importance, affecting, if the present decision of the Circuit Court of Appeals should stand, millions upon millions of negotiable securities which are really part of the public funds of the United States, and inasmuch as the judgment of the Circuit Court of Appeals is final, and the opinion already given was not unanimous, and no appeal or writ of error can be taken to the Supreme Court of the United States, and inasmuch as the present decision and judgment of the Circuit Court of Appeals affect with invalidity the total issue of $360,000 of bonds by the defendant city for supposed defects in the issue of only $89,000 thereof issued on account of the purchase of the water plant by the city, which supposed defects do not relate to the merits of the said $89,000 indebtedness (for the said amount is part of the purchase price of the water plant owned and enjoyed by the city), but only to the technical form of the city's obligation to pay said amount, —we respectfully suggest and earnestly urge upon the Court that, if it does not see its way clear to affirming the judgment of the Circuit Court of the United States, for the reasons above mentioned it will carefully consider the propriety of certifying as above suggested the decisive and vital questions in this case to the Supreme Court of the United States.

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Office Supreme Court U.S.
FILED
APR 16 1901
JAMES H. McKENNEY,
Clerk.

No. 248.

Brf. of Dillon, Hubbard & Dillon for Petitioner.

Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed April 16, 1901.

No. 248.

ALBERT H. WAITE,

Petitioner,

against

THE CITY OF SANTA CRUZ.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR PETITIONER.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
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8023

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 248.

ALBERT H. WAITE,
Petitioner,

AGAINST

THE CITY OF SANTA CRUZ.

Brief for Petitioner.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

STATEMENT OF THE CASE.

This is an action at law brought on negotiable coupons of negotiable bonds, and also upon some of said bonds which had matured, issued by the defendant The City of Santa Cruz, California (Complaint, Record, p. 5).

The bonds and coupons in question in the present case were issued under the refunding statute of California, hereinafter quoted, and were issued under full and regular proceedings of the city council, and vote of the qualified voters of the city, authorizing the same (Findings of Fact No. 5 *et seq.*, Record, p. 19. See Ordinance No. 314, Record, p. 26; Ordinance No. 315; Additional Finding of Fact No. 2, Record,

p. 32, and extracts from Ordinance No. 320, Record, p. 20, Finding of Fact No. 8). The city council sold these bonds to Coffin & Stanton under an agreement to deposit with Coffin & Stanton the proceeds of the sale of the said bonds instead of receiving pay for the said bonds in money (see the said agreement, Finding of Fact No. 10, Record, pp. 22, 23); the city council, however, taking a bond of the American Debenture Company as surety to secure the performance of the contract by Coffin & Stanton, after investigating as to the financial standing of said American Debenture Company and finding it "*was the highest given*" (Record, p. 65). After the delivery of the bonds under such sale the bonds were sold and disposed of by Coffin & Stanton to various *bona fide* purchasers (Finding of Fact No. 12, Record, p. 24). Afterwards the said firm of Coffin & Stanton became insolvent and unable to pay the city of Santa Cruz the proceeds so deposited (see Finding of Fact No. 15, Record, p. 24). If it had not been for their insolvency and their consequent inability to comply with the terms of their agreement, there is no reason to suppose that any question would ever have been made by the city concerning the legality of these refunding bonds. There is no finding of fact, nor is there the slightest evidence in the record to show, or tending in any way to show, that either the city officers of the city of Santa Cruz, on their part, or the said firm of Coffin & Stanton, on its part, acted otherwise than in good faith and with perfect honesty in the entire transaction.

On this point Circuit Judge GILBERT, giving his dissenting opinion in the Circuit Court of Appeals, said (p. 321):

"Through all the transactions culminating in the delivery of the bonds, it is clear that the officers acted in the utmost good faith. There was no fraud, misrepresentation or concealment."

This statement is fully borne out by the record, and none of the judges made any contrary statement.

The case was tried before the Circuit Court without a jury, a stipulation in writing waiving a jury having been duly filed (Record, p. 18).

The court found that the plaintiff was a *bona fide* holder of the said bonds and coupons, he having acquired the same from *bona fide* purchasers thereof, who had paid value without any notice of any illegality or alleged illegality in regard to the same (Record, p. 18, Findings 1 and 2; and p. 24, Finding 12). This statement does not include the three bonds and coupons mentioned in Finding 3 of Findings of Fact by the Circuit Court (Record, p. 18).

The Enabling Act.

The statute under which the said bonds were issued is as follows (Session Laws of California, 1893, p. 59):

"An Act to amend an Act entitled 'An Act to authorize the Common Council, Board of Trustees or other governing body of any incorporated city or town, other than cities of the first class, to refund its indebtedness, issue bonds therefor, and provide for the payment of the same,' approved March 15, 1883.

"*The People of the State of California, represented in Senate and Assembly, do enact as follows:*

"SECTION 1. That section one of the above-entitled Act is hereby amended to read as follows:

"SECTION 1. That whenever any incorporated city or town, other than cities of the first class, in this State, has *an outstanding indebtedness, evidenced by bonds and warrants thereof*, the common council, Board of Trust-

ees, or other governing body thereof, shall have power to submit to the qualified electors of such city or town, at an election to be held for that purpose, the question of refunding such indebtedness. Said election shall be called and held in the same manner in which other elections are held in such city or town. The notice of such election shall recite the indebtedness to be refunded, together with the denomination, character, time of payment, rate of interest, as well as all other details of the bonds proposed to be issued. Such bonds shall be of the character known as 'serials,' one-fortieth of the principal being payable each year, together with interest due on all sums unpaid. Said bonds may be issued in denominations not to exceed One thousand dollars, nor less than One hundred dollars; principal and interest being payable in gold coin or lawful money of the United States, and either at the office of Treasurer of such city or town, or at a designated bank situated in the cities of San Francisco, New York, Boston, or Chicago. Interest upon the same shall not exceed six per cent. per annum, and may be payable semi-annually. Said bonds shall be sold in the manner provided by such city council, or other governing body, to the highest bidder, for not less than their face value, in the same character of money in which they were payable. The proceeds of such sale shall be placed in the Treasury to the credit of the funding fund, and shall be applied only for the purpose of refunding the indebtedness for which they have been issued. Said common council or other governing body, shall, at the time of fixing the general tax levy for each year, and in the same manner for such tax levy provided, levy and collect annually, each year, sufficient money to pay one-fortieth part of the principal of such bonds, and also the annual interest upon the portion remaining unpaid.

"SEC. 2. That section two of said Act be amended so as to read as follows:

"SEC. 2. Whenever sufficient money is in the funding fund in the hands of the Treasurer, to redeem one or more of the outstanding bonds proposed to be refunded, he shall publish once a week for two weeks in some newspaper of general circulation published in such city or town, if there be any, a notice to the effect that he is prepared to pay such bond or bonds (giving the number thereof), and if the same are not presented for redemption within thirty days after the first pub-

lication of such notice, the interest on such bonds will cease. He shall, at the same time, deposit in the Post Office, a copy of such notice, enclosed in a sealed envelope, with the postage paid thereon, addressed to the owner or owners of such bond or bonds at the Post Office address of such owner or owners, as shown by the record thereof kept in the Treasurer's office. If such bond or bonds are not presented within the time specified in such notice, the interest thereon shall then cease, and the amount due be set aside for the payment of the same, whenever presented. All redemption of bonds shall be made according to the priority in the order of their issuance, beginning at the first number. Whenever such outstanding bonds are surrendered and paid, the Treasurer shall proceed to cancel the same by indorsing on the face thereof the amount for which they are received, the word 'canceled,' and the date of cancellation. He shall also keep a record of such bonds so redeemed, and shall make a report of the same to the common council, or other governing body of such city or town, at least once a month, accompanying the same therewith by the bonds which have been taken up and canceled.

"SEC. 3. That section three of said Act be amended so as to read as follows:

"SEC. 3. All moneys which shall remain in said funding fund after all outstanding bonds as were proposed to be refunded have been taken up and canceled, shall be paid into the General Fund of such city or town, and become a part thereof.

"SEC. 4. This Act shall take effect and be in force immediately after its passage."

Approved March 1, 1893.

The said Act of March 15, 1883, was thus entirely superseded by the said Act of March 1, 1893, except Section 4, the only remaining section of the said Act of March 15, 1883, which said Section 4 is as follows (Session Laws of California, 1883, pp. 370, 373), to-wit:

"SEC. 4. Should there remain in said Bond Fund any money after all such bonds shall have been redeemed, the balance so remaining shall be paid into the General Fund of such city (or town), and become a part thereof."

Note that this statute (sec. 1, *supra*) confers upon any incorporated city or town express power to refund "an outstanding indebtedness evidenced by bonds and warrants thereof." Note also that there is nothing peculiar in this enabling statute as to the mode of exercising the express power to refund the obligations of the municipality, or as to any record to be kept by the municipality; and observe also that there is no requirement in the statute that the purchasers shall be bound to take notice of the ordinances or records of the municipality relating to the issue of the refunding bonds, which bonds the statute contemplates shall be long-time negotiable securities, and placed upon the market and sold as such.

In all these respects this case presents only the usual and ordinary case of negotiable municipal bonds, and there is absolutely nothing peculiar in this case *except the decision and judgment of the Circuit Court of Appeals.*

Copy of Bonds and Coupons Involved in Present Action.

The refunding bonds and coupons involved in the present action are in the following form (Complaint, Record, pp. 4–6, and Findings of Court, Record, p. 18, *et seq.*).

" Number.
" ---------- Dollars.
" $1,000.
" United States of America. State of California.
" Bond of the City of Santa Cruz. Refunding Gold Bond.
" Five per cent. Series 1.

" The City of Santa Cruz, a municipal corporation, in the county of Santa Cruz, State of California, is in-

debted to and promises to pay to the bearer, for value received, the sum of one thousand dollars ($1,000), gold coin of the United States, on the fifteenth day of April, A. D. 1895, with interest thereon, in like gold coin, at the rate of five (5) per cent per annum, payable annually on the fifteenth day of April, of each calendar year from the date hereof, at the office of the city treasurer of said city of Santa Cruz, on presentation and surrender of the proper interest-bearing coupon hereto attached.

"And for the payment of the principal sum herein named, and the interest accruing thereon, the said city of Santa Cruz is held and firmly bound and its faith and its credit and all the real and personal property of said city, are hereby pledged for the prompt payment of this bond and interest at maturity.

"This bond is one of a series of bonds of like date, tenor, and effect, issued by the said city of Santa Cruz, for the purpose of refunding the bonded indebtedness of said city and issuing bonds therefor, and providing for the payment of the same under and in pursuance of and in conformity with, the provisions of an act of the legislature of the State of California, entitled 'An act to amend an act entitled "An act authorizing the common council, board of trustees, or other governing body of any incorporated city or town, other than cities of the first class, to refund its indebtedness, issue bonds therefor, and provide for the payment of the same" (approved March 15, 1883),' approved March 1, 1893.

"And in pursuance of and in conformity with the Constitution of the State of California, and the ordinances of the city of Santa Cruz, and in pursuance of and in conformity with a vote of more than two-thirds of all the qualified electors of said city of Santa Cruz, voting at a special election duly and legally called and held and conducted in said city as provided under said act, on Tuesday, the thirteenth day of March, 1894, notice thereof having been duly and legally given and published in the manner as required by law, and after the result of said election had been canvassed, found and declared in the manner and as required by law.

"And it is hereby certified and declared that all acts, conditions, and things required by law to be done precedent to and in the issue of said bonds, have been properly done, happened, and performed in legal and

due form, as required by law. This bond ceases to bear interest when due, unless presented for payment.

"In testimony whereof, the said city of Santa Cruz, by its mayor and common council, has caused this bond to be signed by the mayor of said city of Santa Cruz, and attested by its said clerk, with the seal of said city attached, this sixteenth day of April, A. D. one thousand eight hundred and ninety-four.

[SEAL] WM. T. JETER.

"Mayor of the City of Santa Cruz.

"[Attest];

O. J. LINCOLN,

"City Clerk.

[ENDORSED]:

Number_____

"State of California. The City of Santa Cruz. 1000 dollars. Refunding five per cent Gold Bond.

"$1,000. $1,000.

"Series 1. Interest payable annually April 15. Principal due April 15, 1895.

"(Surcharged on face of bond) $1,000."

"$50. [COUPON]: $50.

"The city of Santa Cruz will pay to bearer hereof, on the fifteenth day of April, 1895, at the office of the city treasurer of said city, fifty dollars, gold coin of the United States, for interest on refunding bond issued sixteenth day of April, A. D. 1894.

"No._____

"WM. T. JETER,

"Mayor of the City of Santa Cruz.

"O. J. LINCOLN,

"City Clerk.

"[Surcharged *of* face of coupon]: 1."

Express Recital in Bond Fatal to the Defense Held Good by the Circuit Court of Appeals.

Note that the bond expressly recites, among other things:

"This bond is one of a series of bonds of like date, tenor, and effect, issued by the said city of Santa Cruz, **for the purpose of refunding the bonded indebtedness of said city** and issuing bonds therefor, and providing for the payment of the same under and pursuance of and in conformity with, the provisions of an act of the legislature of the State of California, entitled," &c. (reciting the title of the said act of 1893 above quoted).

The City's Defense.

It was alleged as a defense to these bonds (and this was the *only ground* on which the Circuit Court of Appeals held them invalid, see statement to that effect in the Opinion of Circuit Court of Appeals, Record, pp. 309, 315) that out of the $360,000 of old bonded indebtedness authorized to be refunded the sum of $89,000 was not technically bonded indebtedness of the city of Santa Cruz, but was bonded indebtedness of a water company, the plant of which, however, had been purchased by the city *subject to a mortgage securing the said $89,000 of bonds, which bonded indebtedness of $89,000 secured by said mortgage the city had upon its purchase assumed and agreed to pay*, and in its notice of election and in its ordinance calling the election for voting on the refunding bonds, declared "*became thereby a part of the bonded indebtedness of the City of Santa Cruz*" (Additional Findings of Fact, Record, pp. 32, 34 at bottom).

The alleged illegality in the issue of the refunding bonds in question was that they were issued in part to refund bonds of a water company, which water-company bonds the city had assumed upon the purchase of the water plant, agreeing to pay the same; thus, in substance and legal effect, making them the bonds of the city. It is claimed by the city, and the opinion of the Circuit Court of Appeals holds that any purchaser of these refunding bonds is bound to look at the ordinances, notices and proceedings of the city authorizing the issue of these refunding bonds. This we deny.

It is further claimed by the city that, if the ordinance calling the election had been examined by a person intending to purchase the refunding bonds, he would have seen therein the notice of election, and that such notice of election stated th at the refunding bonds were issued in part for the purpose of refunding water-company bonds thus assumed by the city.

We do not admit that the water-company bonds thus assumed by the city were not bonds of the city within the meaning of the statute that authorized the city to issue refunding bonds. But whether they were or not is immaterial so far as a *bona fide* holder of refunding bonds is concerned.

Decision by Circuit Court in Favor of Bondholder.

The Circuit Court held that this defense would be good against a purchaser of these bonds who had notice—a proposition which we dispute (see Point III. of this brief, *infra*, p. 114). The Circuit Court, however, rightly held that this defense could not be made against the *bona fide* holders of the said refunding bonds. The

Circuit Court, DE HAVEN, J., said on this point in its opinion (Record, p. 54) :

"It is next insisted by defendant that Wallace & Co. [the *bona fide* purchasers of the bonds and predecessors in title to the plaintiff Waite] must be deemed to have purchased such bonds with notice that they were issued in part to refund and take up the mortgage bonds of the private corporation, because each bond contained the recital that it was issued 'in pursuance of and in conformity with the Constitution of the State of California, and the ordinances of the city of Santa Cruz.'

"The proposition for which the defendant contends upon this point is, that by this general reference to the ordinances of the city, all purchasers were put upon inquiry as to the terms of the ordinances under which the bonds were issued; and that as it appears from these ordinances that a part of the refunding issue was to be used in refunding the mortgage bonds of the private corporation, all persons purchasing the bonds are to be charged with notice of this fact. I do not think this contention can be sustained, although it is apparently supported by the case of *Post v. Pulaski County*, 49 Fed., 629, cited by the counsel for defendant.*

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* The case cited, *Post v. Pulaski County*, has been expressly overruled by the very court which originally decided it, namely, the United States Circuit Court of Appeals for the Seventh Circuit. That court said in *Wesson v. County of Saline*, 73 Fed. Rep. 917, 919 (Mr. Justice HARLAN sitting at the hearing, but not participating in the decision) :

"But the proposition enunciated in *Post v. Pulaski County*, that 'the recital in the bonds that they were issued pursuant to an order of the county court put whosoever should come into possession of these bonds, even if purchased for value in the open market, upon inquiry as to the terms of that order,' is inconsistent with, and must be regarded as overruled by the recent ruling of the Supreme Court in the case of *City of Evansville v. Dennett*, *supra*, where it was held that a recital that a subscription to the stock of a railroad company was 'made in pursuance of an act of the legislature and ordinances of the city counsel, passed in pursuance thereof, * * * imported not only compliance with the act of the legislature, but that the ordinances of the city council were in conformity with the statute."

The recital above quoted does not stand alone. In addition to and immediately preceding it, **the bonds under consideration expressly state that they were 'issued for the purpose of refunding the bonded indebtedness' of the city of Santa Cruz, and in conformity with the act of the legislature which they recite.** The further statement, that their issuance was also in conformity with the ordinances of the city of Santa Cruz, does not detract from or modify the effect of the prior recital concerning the purpose for which the bonds were issued, and certainly cannot be construed as a warning to purchasers to examine the ordinances and determine for themselves and at their peril whether the previous representation in relation to the purpose for which the bonds were issued was true or false. On the contrary, this general reference to the ordinances of the city of Santa Cruz must be read in connection with the other parts of the instrument in which it is found, and when this is done and all the recitals are given effect, it is at once seen that they import not only that the bonds were issued in conformity with the act of the legislature, 'but that the ordinances of the city council were in conformity with the statute.'

"*Evansville v. Dennett*, 161 U. S., 434. See, also, *Hackett v. Ottawa*, 99 U. S., 86; and the well considered case of *Risley v. Village of Howell*, 64 Fed., 453."

The Circuit Court accordingly rendered judgment in favor of the plaintiff (Record, p. 41).

Decision and Judgment in Circuit Court of Appeals.

The City of Santa Cruz took a writ of error to the Circuit Court of Appeals for the Ninth Circuit (Record, pp. 259, 303-308), and that court by a vote of two Judges against one dissenting Judge held that, notwithstanding these recitals in the bonds, a *bona fide* purchaser of the same was put upon notice of the ordinances and records of pro-

ceedings of the city council of the city of Santa Cruz, *and on this ground alone* held that the bonds were invalid, and reversed the decision of the Circuit Court, with direction to enter judgment for the defendant on the findings (Opinion of Court by Ross, C. J., Record, p. 309; and Dissenting Opinion by GILBERT, C. J., Record, p. 316; and Judgment, Record, p. 321).

The Court held not merely $89,000 of the refunding bonds invalid, but the whole $360,000 invalid on account of the supposed defect that $89,000 old bonds refunded were technically not bonds of the city, although even these $89,000 old bonds were really indebtedness of the city and bonded indebtedness. This is monstrous injustice (see this Brief, POINT III. *infra*).

The decision of the Circuit Court was given by District Judge DE HAVEN (Record, p. 42), and the decision of the Circuit Court of Appeals was given by Circuit Judge Ross (Record, p. 309), and concurred in by District Judge HAWLEY, but Circuit Judge GILBERT dissented (Record, p. 316).

The plaintiff filed a petition in the United States Circuit Court of Appeals for rehearing in that Court, which petition was denied (Record, p. 322).

Certiorari Granted by this Court.

Thereupon plaintiff filed a petition in the Supreme Court of the United States for a writ of *certiorari* to bring this case to this court, under Section 6 of the act of Congress of March 3, 1891 (26 U. S. Stat., 826); and such petition was granted (177 U. S., 695), and such writ of *certiorari* was accordingly issued

(Record, p. 323), and the record and proceedings in this cause have been returned to this court pursuant to the said writ (Record, pp, 323–325):

As the case now stands, therefore, two of the Judges, a Circuit Judge, and a District Judge, have given opinions one way on the question involved, and two other Judges, a Circuit Judge and a District Judge, have given precisely opposite opinions in the same circuit.

Circuit Judge Ross in his opinion in the Circuit Court of Appeals says (Record, p. 314 *et seq.*):

"The statute itself was clear notice to every person that upon the records of the governing body of the city was required to be entered the specific indebtedness proposed to be refunded, together with the details of the proposed issue of refunding bonds, and that it was only for such specified indebtedness that any refunding bonds could be issued. To that record every purchaser was referred by the very act under which alone the bonds in suit were issued."

The learned Judge is demonstrably mistaken in supposing that the statute required to be entered upon the record or minute book of the city council the specific indebtedness proposed to be refunded. A reading of the statute above quoted shows that this is not the fact. The statute only requires that "the *notice of election* shall recite the indebtedness to be refunded" (Sec. 1), and the statute nowhere requires that such notice of election be spread upon the records of the city, and nowhere requires that the ordinance shall describe or recite the indebtedness to be refunded. The learned Judge was mistaken, therefore, in supposing that even if a *bona fide* purchaser were put upon no-

tice of such records he would have had constructive notice of the specified indebtedness proposed to be refunded. Of course, in any case of constructive notice, a person has constructive notice of only what is required by law to be put on a record (See cases on this brief, *infra*, pp. 86–89.)

But, even if the specific indebtedness to be refunded was required by the statute to be entered upon the record or minute book of the city council, still a bona fide purchaser of these negotiable bonds with such recitals as these bonds contain would not have been put upon notice of what such indebtedness was contracted for, much less that there was any illegality in such indebtedness. See the cases of *Evansville vs. Dennett*, 161 U. S., 464; *Hackett vs. Ottawa*, 99 U. S., 86, and *Gunnison County Commissioners vs. Rollins*, 173 U. S., 255, in all of which the opinions were delivered by Mr. Justice HARLAN, and other cases cited on this brief under Point I., *infra*, pp. 51–72.

In the case of *Evansville vs. Dennett*, 161 U. S., 434, where the charter of the city of Evansville expressly required all the ordinances and resolutions to be entered on the records of the city, and in the case of *Graves vs. Saline County*, 161 U. S., 359, where the county refunding bond act expressly required the officer to enter upon his record "the description of the bond or evidence of indebtedness for which, or for the purchasing or retiring of which the same was given" (Session Laws of Illinois, 1879, p. 231), **this Court expressly holds that a bona fide holder of bonds with recitals such as the present bonds contain need not examine such**

ordinances, resolutions or proceedings of the municipality.

The negotiability of municipal bonds and the conclusiveness of recitals therein in favor of a *bona fide* holder do not depend upon the question whether or not the charter of the municipality or the laws governing the same expressly require that certain records of the municipality be kept. It is the universal practice of municipalities to keep records, and everybody knows this, and courts take cognizance of the fact. Not only so, but in every instance, or in almost every instance, these records are kept under express requirements of the statute, and have been so wherever municipalities have been established. All these facts as to keeping records and as to the requirements of keeping records have been present in every one of the cases where municipal bonds have been held good in the hands of *bona fide* holders, notwithstanding what appeared in the ordinances, resolutions and other records of the municipalities issuing them. It is also safe to say that in every instance, or in almost every instance, a full and careful examination of these records might have disclosed the various illegalities complained of in the defenses set up against the various issues of bonds which have been held valid in the hands of *bona fide* holders. What the Supreme Court of the United States has repeatedly said is that the holder of negotiable municipal bonds with recitals need not examine such records of ordinances, resolutions and other proceedings. Any view which would narrow the negotiability of municipal bonds so as to make it obligatory upon any and every holder to examine the ordinances, resolutions and other proceedings of the municipality misconceives the very purpose of having such munici-

pal bonds negotiable, which is that the holder of the bonds be not obliged to go there and examine all of the ordinances, resolutions and records of the municipality. To this effect are all the decisions of the Supreme Court of the United States.

STATEMENT OF QUESTIONS PRESENTED BY THE RECORD AND BILL OF EXCEPTIONS IN THE PRESENT CASE.

No error in the Circuit Court's overruling the defendant's demurrer to the amended complaint.

The defendant filed its demurrer to the amended complaint in this action (Record, pp. 7, 8). The *first* ground of demurrer is that the complaint does not state facts sufficient to constitute a cause of action. Obviously a demurrer on this ground cannot be sustained, as a mere glance at the amended complaint (Record, p. 3), and the statute under which the bonds were issued (this Brief, *supra*, p. 3), will readily show.

The *second* ground of demurrer is that the act under which the bonds were issued was in conflict with the constitution of California and the constitution of the United States. The Supreme Court of California has expressly held with regard to this very act that it does not conflict with the constitution of California *(Los Angeles vs. Teed*, 112 Cal., 319.*)* Obviously the act does not conflict with the constitution of the United States (See this Brief, p. 157).

The *third* ground of demurrer assigned is that the complaint is uncertain in this: *(a)* that while the com-

plaint alleges that all acts, conditions and things required to be done, &c., in the issuance of the bonds, have been done, it does not appear therefrom what, if any, acts, conditions and things were done, &c.; and *(b)* that it does not appear from the complaint whether or not the bonds therein mentioned were sold for not less than their face value in gold coin as required by law. Obviously this ground of demurrer is not well taken. In declaring on a negotiable bond, or a coupon, it is sufficient to set forth the fact that the defendant made, executed and delivered the bond, or coupon, either setting forth the substance of the bond, or coupon, or a copy thereof. It is not necessary for the plaintiff to allege and prove the performance by the municipality of all the conditions precedent to the issuance of the bonds. Negotiable instruments are in the nature of specialties, and it is necessary only to allege and prove the *factum* of such instruments.

If there was any defect in any of the proceedings, this was a matter of defense to be pleaded and proved by the defendant, and not a matter which the plaintiff was required to plead or prove. The foregoing principles are so well established, and so familiar to this Court, that we need not waste any time in citing the numerous authorities which sustain them.

DEMURRER OVERRULED.—The Circuit Court overruled this demurrer. Mr. Justice MCKENNA, then Circuit Judge, rendered the decision (Record, p. 8; See opinion of Circuit Judge MCKENNA, 75 Fed. Rep., 967.)

ANSWER.—Thereupon the defendant made and filed its answer (Record, p. 9 *et seq.*).

FILING ANSWER WAIVED ANY FORMAL DEFECTS IN COMPLAINT, IF ANY SUCH EXISTED, WHICH WE DENY.—As a matter of fact, there are no defects in the plaintiff's

complaint, but even if there were, it is well settled that the defendant, by answering when his demurrer to the complaint was overruled, instead of suffering judgment to be entered and then taking a writ of error to reverse the ruling on the demurrer, waived any formal defects, if any there were, in the complaint, which might have been taken advantage of by demurrer, if the defendant had persisted in his demurrer instead of pleading over. After such answer and trial upon the issues, and after findings of fact and judgment entered, it is too late for the defendant to raise any question of any formal defects in the complaint, if any such existed, and none such did exist. It is not necessary to cite to this Court the numerous authorities in support of the foregoing propositions.

Findings of Fact.

As above stated, this case was tried by the Circuit Court without a jury, a stipulation in writing waiving a jury having been duly filed (Record, p. 18, and pp. 41, 60). The Court, on September 29, 1898, made and filed special findings of fact and conclusions of law (Record, pp. 18-25), and on the same date, September 29, 1898, entered judgment on such findings in favor of the plaintiff (Record, p. 41).

Not Reviewable Error to Deny Motion for New Trial.

Afterwards the defendant made a motion for a new trial (Record, p. 252), which motion was denied (Record, pp. 253, 25). It is, of course, well-settled law that no error can be predicated in the United States

Courts of the refusal of the trial Court to grant a motion for a new trial, nor in respect of any of the matters urged upon the Court upon such motion for a new trial. On this point see *Ayers vs. Watson*, 137 U. S., 584, which was an action at law, tried before a jury; in which verdict was for plaintiff, and motion was made for a new trial. This Court says (p. 597):

"We have only to repeat what we so often endeavored to impress upon counsel, that error does not lie for granting or refusing a new trial."

See, also, to the same effect:

Missouri Pacific Railway Company vs. Chicago & Alton Railroad Company, 132 U. S., 191, in which case there was a trial by Court without a jury.

Fishburn vs. Chicago, Milwaukee & St. Paul Railway Company, 137 U. S., 60.

Fitzgerald & Mallory Construction Company vs. Fitzgerald, 137 U. S., 98.

No error, therefore, can be predicated in this Court of the trial Court's refusal to grant the motion for a new trial, or for any of the matters that were brought to the attention of the trial Court, or its action thereon, upon such motion for a new trial. As to such motion for a new trial, and as to all of the matters urged upon the Court upon such motion for a new trial, the defendant had already had its day in court, and an opportunity to be heard upon the original trial—in other words, it is not error for the court to refuse to grant a motion for a new trial. It may grant one as a matter of discretion and of grace, but it is not a matter to which a party can claim a right.

Additional Findings of Fact.

While the said motion for a new trial was pending, defendant moved the court (Record, p. 253 *et seq.*) to make certain additional findings, and excepted to certain additional findings which the court did make Record, p. 254 *et seq.*). The additional findings of fact made by the court are set forth in the Record (pp. 25–41). These were made and "filed December 1, 1898, *nunc pro tunc*, as of September 29, 1898" (Record, p. 41).

It is well settled that in an action at law tried by a United States Circuit Court without a jury, where a jury trial has been waived by the parties by a writing duly filed under the United States statute, neither the findings of fact by the court, nor its refusals to find facts requested by either of the parties, constitute any error, and the question whether the court correctly found the facts or correctly refused to find other facts cannot be reviewed on writ of error in this court.

This court cannot look into the evidence to see whether or not such findings of fact were correct or were supported by the evidence, or whether the evidence would have justified the court in making other findings of fact requested by either of the parties.

It follows, therefore, that, so far as this record and bill of exceptions contain any exceptions to the court's findings of fact or refusals to find facts, these are not matters which can be considered here upon this writ of error. The only questions presented upon this writ of

error, therefore, are whether the facts found by the Circuit Court are sufficient to sustain the judgment in favor of the plaintiff, and whether the trial court made any erroneous ruling upon the admission or rejection of evidence. No question can be raised as to whether the evidence supports the findings of fact, and this court cannot, and will not, look into the evidence to see whether it sustains the findings of fact.

The same rules and principles of law apply in the United States Circuit Courts of Appeals on writs of error to the United States Circuit Courts. The language of the act of March 3, 1891 (26 U. S. Stat., 826), establishing the United States Circuit Courts of Appeals, is that such courts (Section 6) "shall exercise appellate jurisdiction to review by appeal or writ of error," etc., and by the very nature of a writ of error at common law, and under the constitution of the United States and the acts of Congress below cited, the same rule applies to review on writ of error in the Circuit Courts of Appeals as to review on writ of error in the Supreme Court of the United States.

Hill vs. Woodberry, 4 U. S. App., 68.
Mirchen vs. Hart, 36 U. S. App., 958, and
Syracuse vs. Rollins, 104 Fed. Rep., 958 (Oct., 1900).

Furthermore, this case is here on *certiorari* issued by this court to the United States Circuit Court of Appeals, under Section 6 of said act of Congress of March 3, 1891 (26 U. S. Stat., 826), which provides:

"It shall be competent for the Supreme Court to require, by *certiorari* or otherwise, any such case to be certified to the Supreme Court for its review and determination, *with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.*"

The Only Questions in the Case.

In the present case, therefore, on this writ of *certiorari*, the only questions which are open on the record in this case are whether the facts as found by the Circuit Court are sufficient in law to sustain the judgment rendered in favor of the plaintiff, and whether there were any erroneous rulings on the admission or rejection of evidence during the progress of the trial, to which any objections were made and exceptions taken by the defendant.

Section 700, Rev. St., provides:

"SEC. 700. When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

Note the language of Section 649—"The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury"—that is, a special finding of the court upon the facts is conclusive, and, as is stated by this court in the case of *Stanley vs. Supervisors of Albany*, 121 U. S., 535, 547, "Where a case is tried by the court without a jury, its findings upon the questions of fact are conclusive here;" and no error can be assigned here as to the court's finding, or refusing to find, certain facts. "Such rulings are not open to review here; they can be considered only by the court below."

The language of Section 700 is, "when the finding is

special, the review may extend to the determination of the sufficiency of the facts found to support the judgment." Thus, the question that arises where the finding is special is: Do the facts as found by the trial court support the judgment? And no question arises as to the weight of evidence or the sufficiency of evidence to sustain the findings of fact.

In *Norris vs. Jackson*, 9 Wallace, 125, Mr. Justice MILLER, giving the opinion of the court, in speaking of the act of Congress of March 3, 1865, now contained in Sections 649 and 700 of the Revised Statutes, says (p. 127):

"This special finding has often been considered and described by this court. It is not a mere report of the evidence, but a statement of the ultimate facts on which the law of the case must determine the rights of the parties; a finding of the propositions of fact which the evidence establishes, and not the evidence on which those ultimate facts are supposed to rest.

"The next thing to be observed is, that whether the finding be general or special, it shall have the same effect as the verdict of a jury; that is to say, it is conclusive as to the facts so found."

Certain of the City's Assignments of Error Relate to Matters Not Reviewable by this Court.

It follows, therefore, that many of the numerous and lengthy assignments of error contained in the record in the United States Circuit Court of Appeals, and printed in the present record (pp. 259-302, inclusive), are not open to consideration. Thus, the assignments of error numbered 23 to 46, inclusive (Record, pp. 269-

289, inclusive), which are assignments of error for the court's finding certain facts or refusing to find certain other facts, as well as the exceptions of the defendant to the court's finding certain facts or refusing to find certain other facts, are not any of them open to consideration in this court.

The foregoing principles of law are well settled by numerous decisions of this court.

Where a case is tried by the court without a jury, its findings upon questions of fact are conclusive, and no error can be predicated of the action of the court in finding particular facts, nor upon its refusal to find other facts requested by either of the parties.

In *Stanley vs. Supervisors of Albany*, 121 U. S., 535, an action at law was tried by a United States Circuit Court without a jury, jury trial having been waived by the parties. On writ of error the Supreme Court of the United States said (p. 547):

"Several of the assignments of error presented for our consideration are to rulings of the court below upon the evidence before it, to its finding of particular facts and to its refusal to find other facts. Such rulings are not open to review here; they can be considered only by the court below. Where a case is tried by the court without a jury, its findings upon questions of fact are conclusive here; it matters not how convincing the argument that upon the evidence the findings should have been different. Thus, the principal finding of the court is: 'That the plaintiff has failed to establish the allegations in said complaint; that the several assessments herein referred to were at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of this state.' And the first assignment of error is that the court erred in deciding that the plaintiff failed to establish the allega-

tions mentioned, and the greater part of the oral argument of the plaintiff's counsel and of his printed brief was devoted to the maintenance of this proposition, which is nothing more than that the court below found against the evidence, a question not open to review or consideration in this court. Only rulings upon matters of law, when properly presented in a bill of exceptions, can be considered here in addition to the question, when the findings are special, whether the facts found are sufficient to sustain the judgment rendered. This limitation upon our revisory power on a writ of error in such cases is by express statutory enactment (Act of March 3, 1865, 13 Stat., c. 86, § 4; Rev. Stat., § 700).

"The same answer will apply to the exceptions taken to the refusal of the court to make certain additional findings. If error was thus committed, it was in not giving sufficient weight to the evidence offered, a matter determinable only in the court below."

It is well settled that upon writ of error the Supreme Court of the United States cannot reverse any decision for any error of fact, but that the facts found by verdict of the jury, whether the same be general or special, also the facts found by the court without a jury, whether such findings be general or special, and whether or not a stipulation in writing has been filed waiving a trial by jury, are conclusive, and the sufficiency of the evidence to support the facts found cannot be inquired into on writ of error.

The seventh amendment to the constitution of the United States provides

"In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law."

It is elementary learning that at the common law questions of fact were for the jury, and only questions of law for the court, and that upon a writ of error only

questions of law can be examined in the higher court, and not questions of fact, whether those facts are found in a general verdict or in a special verdict.

In *Campbell vs. Boyreau*, 21 Howard, 223, Mr. Chief Justice TANEY says (p. 226) :

"By the established and familiar rules and principles which govern common law proceedings, no question of the law can be reviewed and re-examined in an appellate court upon writ of error (except only where it arises upon the process, pleadings or judgment in the cause), unless the facts are found by a jury, by a general or special verdict, or are admitted by the parties upon a case stated in the nature of a special verdict, stating the facts and referring the questions of law to the court.

"The finding of issues in fact by the court upon the evidence is altogether unknown to a common law court, and cannot be recognized as a judicial act. Such questions are exclusively within the province of the jury."

The Revised Statutes expressly provide (Section 1011)

"There shall be no reversal in the Supreme Court, or in a Circuit Court, upon a writ of error * * * for any error in fact."

Section 648 of the Revised Statutes provides

"The trial of issues of fact in the Circuit Courts shall be by jury, except in cases of equity and of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy and by the next section."

Section 649 provides

"Issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties or their attorneys of record file with the clerk a stipulation in

writing waiving a jury. The finding of the court upon the facts, which may be either general or *special, shall have the same effect as the verdict of a jury.*"

In *Miller vs. Life Insurance Company*, 12 Wallace, 285, in which the case was tried by a Circuit Court of the United States "without the intervention of a jury," trial by jury having been waived by the parties (p. 291), the Court found the facts as prayed for by the plaintiff (pp. 291, 292) and entered judgment accordingly, and refused to find the facts as prayed for by the defendant (pp. 292, 293). On writ of error to the Supreme Court of the United States that Court said, Mr. Justice CLIFFORD giving the opinion (p. 299):

"Suppose the facts proved to have been as assumed by the defendants in their requests, then it might well be conceded that the judgment was for the wrong party, but the issues of fact were tried and determined by the Circuit Court, and the act of Congress provides that the finding of the Circuit Court in such cases shall have the same effect as the verdict of a jury, and the Constitution provides that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law (2 Story on the Constitution, § 1770). Facts so tried could only be re-examined, under the rules of the common law, either by the granting of a new trial by the court where the issue was tried or to which the record was returnable or by the award of a *venire facias de novo* by an appellate court for some error of law which intervened in the proceedings (*Parsons v. Bedford*, 2 Peters, 448; 2 Story on the Constitution, § 1770). Matters of fact found by the Circuit Court under such a submission cannot be re-examined here, as by the express language of the act the review, when the finding is general, is confined to the rulings of the court in the progress of the trial, and even when the finding is special nothing else is open to review except the inquiry whether the facts found are sufficient to support the judgment.

Tested by these rules, which are believed to be undeniable, it is clear that no one of the said several requests presented by the defendants shows any ground for reversing the judgment, as every one of them assumes as facts matters dependent upon the evidence, and which are not embraced in the findings of the Circuit Court. All matters of fact must be found by the Circuit Court, and not by the Supreme Court, as the act of Congress provides that the issues of fact may be tried and determined by the Circuit Court where the suit is brought. Rejected by the Circuit Court, as the several requests under consideration were, it is too plain for argument that no one of the propositions of fact therein contained is found to be true by the Circuit Court. On the contrary, the complaint of the defendants is that the Circuit Court improperly found a different state of facts, and gave judgment for the plaintiff. They contend that the Circuit Court ought to have found the facts to be as assumed by them in their requests, and what they seek to accomplish by the writ of error is to show that the finding of the Circuit Court is erroneous, and to induce this court to set aside that finding, affirm the propositions of fact assumed in their requests, reverse the judgment of the Circuit Court, and grant a new trial or render judgment in their favor. Enough has already been remarked to show that nothing of the kind can be done, as the act of Congress requires that the facts must be found by the Circuit Court. *Norris* v. *Jackson*, 9 Wallace, 127. Inferences of fact must be drawn by the Circuit Court, which, by the agreement of the parties, is substituted for a jury, and cannot be drawn by this court, which sits as a court of errors. *Tancred* v. *Christy*, 12 Meeson & Welsby, 323. Conclusions of fact cannot be found by this court when sitting as a court of errors under the act of Congress authorizing the Circuit Courts to try and determine issues of fact in civil cases, as in the case before the court. What is required is that the findings of the Circuit Court shall contain the conclusions of fact, or, as the rule is stated in a recent decision of this court, a statement of the ultimate facts or propositions which the evidence is intended to establish, and not the evidence on which those ultimate facts are supposed to rest, and it is well-settled law that the finding must be sufficient in itself without inferences or comparisons, or balancing of testimony or weighing evidence (*Burr* v. *Des Moines Co.*, 1 Wallace, 102)."

In *Tyng vs. Grinnell, Collector*, 92 U. S., 467, an action at law was tried by a Circuit Court without a jury, a stipulation having been filed waiving a trial by jury, and the court made special findings. Mr. Justice CLIFFORD, giving the opinion of this court, said (p. 471):

"Special findings under such a submission are no more subject to review here than general findings, as the provision in respect to both is that the finding of the court shall have the same effect as the verdict of a jury. Appellate courts have no more power to review the verdict of a jury where it is special than if it be general; but they may inquire and determine whether the special verdict is the proper basis of a judgment; and the act of Congress provides that the review, if the finding is special, may extend to the determination of the sufficiency of the facts found to support the judgment.

Matters of fact in such cases are not reviewable here under any circumstances, as appears by all the cases decided by this court, since the act was passed allowing parties to waive a jury, and to submit the law and fact to the determination of the Circuit Court. Consequently, it is irregular to report the evidence in the transcript, except so far as it may be necessary to explain the legal questions reserved, as to the rulings of the court in the progress of the trial; nor is either party entitled to a bill of exceptions as to any special finding of the court, for the plain reason that the special findings of the Circuit Court in such a case are not the proper subject of exceptions nor of review in this court."

In the case of *Ryan vs. Carter*, 93 U. S., 78, an action at law was tried by a Circuit Court without a jury, a stipulation waiving a trial by jury having been filed. The Supreme Court of the United States, on writ of error, said (p. 81):

"The court below, by stipulation, tried the case, and made a special finding of facts, on which it based its conclusion of law, that the plaintiffs could not recover. It is objected that some of these facts were not warranted by the evidence; but this is not a subject of inquiry here. If the parties chose to adopt this mode of trial, they are concluded by the propositions of fact which the evidence, in the opinion of that court, establishes. Whether general or special, the finding has the same effect as the verdict of a jury: and its sufficiency to sustain the judgment is the only matter for review in this court, (*Norris v. Jackson*, 9 Wall., 125; *Flanders v. Tweed*, *id.*, 425; *Kearney v. Case*, 12 *id.*, 275; *Miller v. Life Ins. Co.*, *id.*, 285)."

It makes no difference in the rule above stated that in the present case the parties stipulated (Record, p. 60):

"that certain facts may be, and are hereby, taken, for the purposes of this action, to be true, and shall be regarded as proven, subject to all objections as to their immateriality, without the introduction of any evidence thereon by either party;"

and also stipulated (Record, p. 91):

"that the witnesses testifying in such depositions testified respectively to the following effect."

Only such facts can be considered as are expressly found by the Court. See on this point *Tyre & Spring Works Company vs. Spalding*, 116 U. S., 541, 545, 546. As stated in the cases above cited, the court finds the ultimate facts and does not find the evidence, and the question is whether the ultimate facts as found by the Court sustain the judgment. No question can be raised whether the evidence supports the findings of fact by the Court, and it makes no difference that it was stipulated by the parties in the present case that the witnesses testified so and so.

In *Lehnen vs. Dickson*, 148 U. S., 71, Mr. Justice BREWER, giving the opinion of the Court, said, with regard to the rule that in cases where a jury is waived the evidence cannot he considered, and only such facts can be considered as are expressly found by the Court, as follows (p. 77):

"But the burden of the statute is not thrown off simply because the witnesses do not contradict each other, and there is no conflict in the testimony. It may be an easy thing in one case for this court, when the testimony consists simply of deeds, mortgages or other written instruments, to make a satisfactory finding of the facts, and in another it may be difficult when the testimony is largely in parol, and the witnesses directly contradict each other. But the rule of the statute is of universal application. It is not relaxed in one case because of the ease in determining the facts, or rigorously enforced in another, because of the difficulty in such determination. The duty of finding the facts is placed upon the trial court. We have no authority to examine the testimony in any case, and from it make a finding of the ultimate facts."

The questions which are open to consideration, then, by this Court, are whether the findings of fact made by the trial Court are sufficient in law to support the judgment, and whether there were any errors committed by the trial Court in its rulings upon the admission or rejection of evidence.

Findings of Fact.

The said Findings of Fact and Conclusions of Law, including also said Additional Findings of Fact are

printed in the Record, pages 18–25 and 25–41, to which reference is hereby made.

Exceptions to Admission or Rejection of Evidence.

During the progress of the trial defendant made objections and took exceptions to the admission of certain evidence, and also to the refusal of the court to admit certain evidence. Some of these exceptions had to do with the admission of evidence showing that certain persons were *de facto* officers of the city of Santa Cruz (Record, pp. 147–150, inclusive, also p. 226). So far as these exceptions to this particular evidence are concerned, the admissiblity of such evidence is connected with and involved in the findings of fact by the court; particularly, findings numbered 9, 10 and 11, and the conclusion of law numbered 1 (Record, pp. 22–25). The question of law involved in such exceptions, and the sufficiency of such findings to support the judgment, are considered by us in the argument in this brief (*infra*, pp. 186–214).

Certain other exceptions relate to the refusal of the court (Record, pp. 251, 252), to permit William H. Flemlng to give certain testimony concerning an entry that he states that he found on the books of F. H. Prince & Company. Mr. Fleming stated, among other things, "I don't remember any particular part that I took in such transaction; I may have, but I don't remember." The testimony which the defendant asked him to give was plainly incompetent and immaterial, as was held by the Circuit Court.

The only substantial question, therefore, in the present case is whether the findings of fact made by the Circuit Court are sufficient in law to sustain the judgment of the Circuit Court in favor of the plaintiff. We proceed to the argument of the legal propositions involved in that question.

ARGUMENT.

I.

The recital in the bonds in question that they are "issued by the said city of Santa Cruz for the purpose of refunding the bonded indebtedness of said city" estops the city from showing, or attempting to show, that the bonds, or any part of them, were issued for a purpose other than that "of refunding the bonded indebtedness of said city;" and such recital is conclusive on this fact in favor of the bona fide holders of said bonds.

The only ground on which the Circuit Court of Appeals based its decision in favor of the defendant the City of Santa Cruz was that out of the $360,000 old indebtedness refunded by this issue of bonds $89,000 was not bonded indebtedness of the city (which proposition we dispute, *post*, p. 114), and that such fact as to $89,000 old indebtedness had the legal effect to invalidate the entire issue of $360,000 refunding bonds, even in the hands of *bona fide* holders. The

$89,000 old indebtedness in question was represented by bonds of the water company secured by mortgage, which bonds and mortgage the city had assumed and agreed to pay as part of the purchase money in the deed whereby it acquired the title to its water-works system. The Circuit Court of Appeals also held that every purchaser of the refunding bonds was bound to examine and to take notice of the contents of the ordinances which authorized the issue of the refunding bonds, notwithstanding the recitals in the bonds, and that, if the purchaser had made such examination, he would have seen that the said $89,000 old indebtedness was not bonded indebtedness of the city, and could not be refunded under the refunding act.

We proceed to show in this point (Point I.) that, even if the city were right in its contention as to the non-fundability of said $89,000 old bonds, which we deny, it is estopped by the recitals in the bonds in suit as against a *bona fide* purchaser from making such defense.

THE PLAINTIFF IS THE *BONA FIDE* HOLDER OF THE BONDS AND COUPONS SUED ON, AND ENTITLED TO MAINTAIN THIS ACTION UPON THEM.*

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* The following banks, trust companies, firms and individuals were, as shown by the evidence in the record, the *bona fide* purchasers of the refunding bonds involved in the present case, having paid full value therefor, or loaned money in the usual course of business on the pledge of the said bonds as collateral security :

John Branch, St. Albans, Vt., 1 bond, No. 297 (Record, p. 91)	$1,000
International Trust Company, Boston, Mass., 16 bonds, Nos. 10, 11, 12, 14, 91, 92, 93, 118-126, inclusive (Record, p. 92)	16,000
Chapman National Bank, Portland, Me., 7 bonds, Nos. 245-251, inclusive (Record, p. 94)	7,000

A *bona fide* holder is a purchaser for value without notice, or the successor of one who was such purchaser (*McClure vs. Oxford Township*, 94 U. S., 429). These bonds and the coupons are payable to bearer and transferable by delivery, and may be sued upon by the bearer. As the previous holders of the bonds in suit were *bona fide* holders for valu e (Findings of Court No. 12, Record, p. 24; amended, Record, pp. 39–41), the plaintiff can avail himself of such previous holders' position without showing that he himself has paid value (*Montclair vs. Ramsdell*, 107 U. S., 147).

The court found as follows (Record, p. 18):

"1. That all of the bonds and coupons referred to in the amended complaint were, prior to the commencement of this action, duly assigned to the plaintiff, and that the plaintiff was, at the date of the commencement of this action, the holder of the legal title to all said bonds and coupons.

Wakefield Trust Company, Wakefield, R. I., 1 bond, No. 21 (Record, p. 95)	1,000
National Bank of the Republic, Boston, Mass., 10 bonds, Nos. 72, 109–117, inclusive (Record, p. 98)	10,000
E. G. & E. Wallace, Rochester, N. H., 150 bonds, including, among others, Nos. 1–8 (Record, pp. 99, 100)	150,000
First National Bank, Worcester, Mass., 22 bonds, Nos. 9, 13, 23, 100, 300–303, inclusive; 308–312 inclusive; 325–327, inclusive; 328, 343, 348–351, inclusive (Record, p. 102)	22,000
First National Bank, Hagerstown, Md., 6 bonds, Nos. 83–87, inclusive, and No. 299 (Record, pp. 104, 109)	6,000
Albany City National Bank, Albany, N. Y., 20 bonds, Nos. 233, 235–244, inclusive, and 280–288, inclusive (Record, p. 106)	20,000
South Norwalk Savings Bank, South Norwalk, Conn., 11 bonds, Nos. 25, 26, 95, 97, 98, 99, 154, 155, 158, 305, 306 (Record, p. 109)	11,000
Bank of Skaneateles, Skaneateles, N. Y., 5 bonds, Nos. 102–106, inclusive (Record, p. 110)	5,000
Farmers' National Bank, Mount Holly, N. J., 4 bonds, Nos. 96, 156, 276 and 313 (Record, p. 113)	4,000

2. That the plaintiff did not pay any money consideration for the assignment to him of any of said bonds or coupons, but all of said bonds or coupons were assigned to plaintiff for collection only."

It is no objection to the maintenance of this action that the plaintiff did not pay any money consideration for the assignment to him of any of the said bonds or coupons, but all said bonds and coupons were assigned to plaintiff for collection only, for all the holders of these bonds were non-residents and not citizens of the State of California. On this point see the case of *Bernards Township vs. Stebbins*, 109 U. S., 341, in which case certain citizens of New Jersey, New York and Pennsylvania had delivered bonds and coupons to the plaintiff (p. 347) "*solely for the purpose of bringing suit*" on the same. This court held that so far as respects the coupons or bonds owned by the citizens

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Kenduskeag National Bank, Bangor, Me., 12 bonds, Nos. 136-138, inclusive, 145, 147-153, inclusive (Record, p. 114) 12,000

National Bank of Waterville, Waterville, N. Y., 1 bond, No. 360 (Record, p. 117) 1,000

First National Bank, Webster, Mass., 4 bonds, Nos. 22, 277, 78, 79 (Record, p. 120)..... 4,000

Martin's Bank, Limited, London, England, 8 bonds, Nos. 184, 185, 186, 201-205, inclusive (Record, pp. 123, 126) 8,000

Northern Counties Investment Trust Company, Limited, England, 3 bonds, Nos. 181, 182, 183. The said company paid for these bonds by surrendering and exchanging therefor 3 bonds of $1,000 each of the City Water Company of Santa Cruz (Record, p. 128)..... 3,000

The findings of fact by the Court do not show (nor did the evidence, except in two or three instances, show) whether or not said *bona fide* purchasers made direct assignments to plaintiff Waite of the nine bonds sued on, numbers 1-9, inclusive, due April 15, 1895, or of the coupons sued on, or whether there were or were not mesne assignments, before the legal title came to the plaintiff Waite. There may or may not have been such mesne assignments. Such fact, however, is immaterial.

of such States other than the State of New Jersey the suit could be maintained in the Federal court, but could not be maintained as respects the bonds or coupons owned by the citizens of the State of New Jersey, of which State the defendant was a citizen. The court on this point said (p. 356) :

" But no valid objection has been shown to the maintenance of these bills, so far as regards those bonds of which the plaintiffs are the bearers, and which are actually owned, either by themselves, or by other citizens of New York or Pennsylvania, to a sufficient amount by each owner to sustain the jurisdiction of the circuit court " (citing numerous cases).

Accordingly, in the present case, both the Circuit Court and also the Circuit Court of Appeals held that the Federal court had jurisdiction.

Of course, if the Federal court had not jurisdiction of the case, then the proper judgment of the Circuit Court of Appeals would not have been to reverse the cause with direction to enter judgment for the defendant, as was done in the present case (Record, p. 316), but to reverse the cause with direction to dismiss the action, so that any judgment would not be an estoppel. And in this view the judgment of the Circuit Court of Appeals would be clearly erroneous and should be reversed.

There was clear statute authority for the issuance of these refunding bonds. Section 1 of the act of March 1, 1893 (Session Laws of California, 1893, p. 59), provides for the refunding by cities of " outstanding indebtedness evidenced by bonds and warrants thereof." (See this enabling act quoted in full in this brief, pp. 3-5).

These bonds recite (see Form of Bond, Complaint, Record, pp. 4–6, and Finding of Court, No. 1, Record, p. 18 *et seq.*), as follows :

" This bond is one of a series of bonds of like date, tenor and effect, issued by the said city of Santa Cruz for the purpose of refunding the bonded indebtedness of said city and issuing bonds therefor, and providing for the payment of the same under and in pursuance of and in conformity with the provisions of an act of the Legislature of the State of California entitled," &c. (reciting the title of the said act approved March 1, 1893).

Legal effect of such a recital in the bonds. The error of the Circuit Court of Appeals.

It is well settled that such a recital as this estops the city from showing, or attempting to show, that the bonds were not issued " *in pursuance of and in conformity with* " the statute, and from showing, or attempting to show, that the bonds were not issued " *for the purpose of refunding the bonded indebtedness of said city.*"

The Circuit Court of Appeals, in its opinion (Record, pp. 314, 315), held that notwithstanding these recitals in the bonds, it was the duty of a *bona fide* purchaser of these bonds to examine the minutes of proceedings of the city council authorizing the issue of these bonds, and also to examine the notice of election, and that if the *bona fide* purchaser had examined these, he would have found that out of the $360,000 old bonds to be refunded, $89,000 were technically not bonds of the city, but were bonds of a water company, the plant and property of which had been purchased by the city, subject to and the city assuming the payment of these

$89,000 bonds, so that these $89,000 of bonds were really indebtedness of the city, and were indebtedness represented by bonds. The Circuit Court of Appeals, therefore, held the entire issue of refunding bonds illegal, even in the hands of a *bona fide* holder.

It is well settled, under numerous decisions of the Supreme Court of the United States, that the *bona fide* holder of municipal bonds containing recitals such as the recital above quoted, which appears in the bonds now in question, is not bound to examine the ordinances and minutes of proceedings of the city council, or notices of election, in order to see whether or not the old indebtedness refunded by the bonds was bonded indebtedness of the city or not. The recital of the fact in the bond is conclusive in favor of the *bona fide* holder.

Evansville vs. Dennett Controlling in Present Case.

The precise question involved in the present case has been decided by this Court in *Evansville vs. Dennett*, 161 U. S., 434, directly contrary to the opinion of the two Judges of the Circuit Court of Appeals, Ross and HAWLEY, in the present case. Mr. Justice HARLAN, giving in the case last cited the unanimous decision of this court, answered all the following questions in favor of the *bona fide* holder, to wit (pp. 439-440, 446):

"1. Does the recital in the series of bonds issued in payment of subscription to the Evansville, Henderson and Nashville Railroad Company, that they were issued in 'pursuance of an Act of the Legislature of the State of Indiana and ordinances of the City Council of said city, passed in pursuance thereof,' put a purchaser

upon inquiry as to the terms of the ordinances under which the bonds were issued? [No].

"2. Does the recital in the series of bonds issued to the Evansville, Carmi and Paducah Railroad Company, that they were issued 'by virtue of a resolution of said City Council passed May 23, 1870,' put a purchaser upon inquiry as to the terms of that resolution, and charge him with knowledge of its terms? [No].

"3. Do the recitals in the bonds issued to the Evansville, Carmi and Paducah Railroad Company, as against a *bona fide* purchaser for value of such bonds, **estop the City of Evansville from asserting that such bonds were not issued, for stock subscribed,** upon a petition of two-thirds of the resident freeholders of the city, distinctly setting forth the company in which stock was to be taken, and the number and amount of shares to be subscribed? [Yes].

"4. Under the recitals in the bonds issued to the Evansville, Carmi and Paducah Railroad Company was a *bona fide* purchaser for value put upon inquiry to ascertain whether a proper petition of two-thirds of the residents of Evansville, freeholders of that city, had been presented to the Common Council, before that body had subscribed for stock in the said railroad company? [No].

"5. Was a *bona fide* purchaser for value of the bonds issued to the Evansville, Carmi and Paducah Railroad Company charged by the recitals in said bonds with notice that they were issued in pursuance of an invalid act, and in pursuance of an election under it [No], or had such a purchaser a right to assume, from the recital, that the prerequisites of both the valid act and the invalid act had been observed by the Common Council before the issuance of such bonds?" [Yes].

The recital in one issue of the bonds in the case of *Evansville vs. Dennett* was that they were issued "*in pursuance of an act* of the legislature of the State of Indiana *and ordinances* of the city council of such city, passed in pursuance thereof;" and in the other issue of said bonds, "*by virtue of an act* of the general assembly of the State of Indiana entitled * * * and *by virtue of the resolution* of said city council of said

city, passed October 4, 1869; * * * and *by virtue of a resolution* of said city council, passed May 23, 1870,' &c. The decision of this court in said case of *Evansville vs. Dennett* was that this recital in the bonds of a particular resolution specifically by date "*did not put a purchaser upon inquiry as to the terms of that resolution and charge him with knowledge of its terms.*" Much less does the recital generally that a bond is issued in pursuance of an ordinance put the *bona fide* purchaser of such negotiable bonds upon inquiry as to the terms of such ordinance.

The statement of Circuit Judge Ross in the opinion of the two Judges of the Circuit Court of Appeals in the present case that "such bodies [as city councils] can only act by order, ordinance, or resolution, as every one is bound to know," was equally true in the case of *Evansville vs. Dennett;* and not only so, but it was expressly recited in the bonds in *Evansville vs. Dennett* that such action had been by ordinance and resolution, and, of course, those ordinances and resolutions were upon the records of the municipality in *Evansville vs. Dennett* as well as in the present case. It is so in the case of every municipality. There is nothing peculiar in this respect in the present case, but it stands on precisely the same footing as the case of *Evansville vs. Dennett.*

The charter of the city of Evansville (Sess. Laws, Ind., 1847, p. 9, sec. 26 *et seq.*), which was in force, and which applied in respect to the proceedings for the issue of the bonds there in question, as well as for other corporate proceedings, provided :

"The common council shall keep a full and fair record of all their proceedings. * * * The Clerk shall attend all meetings of the council, and make and

keep a record of their proceedings. * * * It shall also be the duty of the clerk to safely keep and preserve all records, books, and papers belonging to the city of Evansville, and appertaining to or deposited in his office, entire and without injury or mutilation, and to hand them over, together with all other property of said city in his hands, to his successor. * * * This act shall be deemed and taken to be a public act, and as such may be read as evidence in any court, without being pleaded or particularly referred to in pleading; * * * and transcripts of the records and proceedings of the said common council, certified by the mayor, under the corporate seal, shall be evidence in all courts," &c.

In all this there was nothing peculiar either to the city of Evansville or to the city of Santa Cruz. Substantially these provisions as to the keeping of records of proceedings are true of every municipality, and it is also true that such municipalities can only act by order, ordinance or resolution. The fact referred to by Circuit Judge Ross in giving the opinion of the two Judges of the Circuit Court of Appeals in the present case is that "such ordinance was a part of the public records of the city, which by its charter are required to be kept in 'large, well-bound, uniform and suitable books.'" This, as we have seen, was equally true in the case of *Evansville vs. Dennett*, as in the case of every other municipality. We refer to the language of Judge Ross on this point, because it shows the fundamental error which led to the decision of the Circuit Court of Appeals in the present case.

Negotiable municipal bonds payable to bearer are transferable by delivery, and, on general principles, a purchaser of them is not bound to examine the ordinances and proceedings under which they are issued. They are negotiable, and are not subject to any defense that certain facts existed outside of the bonds

themselves which constitute a defense to them, except the want of statute authority to issue bonds. Such negotiable bonds are designed to pass and do pass from hand to hand by delivery. Savings banks and other banks and trust companies and individuals purchase the same or lend money on the same on the delivery of the bonds to them, and they do this relying on the protection which their negotiable character gives to them. Thus, the 18 or 20 banks, trust companies or individuals who were the purchasers of the refunding bonds involved in the present case acquired the same relying upon their negotiable character.

For a court to hold that such bonds are non-negotiable, and that any bank, trust company or other purchaser must examine all the records of the municipalities issuing them would be to upset the universal course of dealing in these securities by all the savings banks and moneyed institutions in the country to the prejudice of the municipalities as well as the investors. The far-reaching and evil effect of any such decision is obvious. It would prevent the municipalities which rely upon the sale of such securities for the means of making permanent improvements, such, for example, as acquiring water works as in the present case, from making advantageous sales of such bonds, and would generally prevent the dealing in them by savings banks and other institutions which have money to invest or lend, because they would never buy or deal in non-negotiable paper on any such conditions. Of course, it is competent for the constitution or statutes of a State expressly to provide that municipal bonds shall not be negotiable, but shall be open to every defense to which a non-negotiable obligation would be subject, but it is easy

to see why they do not so provide. Thus, Mr. Justice HARLAN states in the recent case of *Gunnison County Commissioners vs. E. H. Rollins & Sons*, 173 U. S., 255:

"Indeed, it is entirely competent for a State to provide by statute that all obligations, in whatever form executed by a municipality existing under its laws, shall be subject to any defense that would be allowed in cases of non-negotiable instruments. But for reasons that every one understands no such statutes have been passed. Municipal obligations executed under such a statute could not be readily disposed of to those who invest in such securities."

Not only are negotiable municipal bonds generally not open to any such defense as that attempted to be raised in the present case, but especially is it true when the bonds, as do the present bonds, recite specifically the truth of the very fact the falsity of which is attempted to be set up as a defense. The statute of California now in question authorizes the issue by a city of refunding bonds to refund "*outstanding indebtedness evidenced by bonds thereof.*" The bonds in suit expressly recite that they are "issued by the city of Santa Cruz *for the purpose of refunding bonded indebtedness of said city*," and this express recital estops the municipality from showing the contrary—namely, showing that the bonded indebtedness which is refunded is not the bonded indebtedness of the city.

This court in the case of *Evansville vs. Dennett* answered in the affirmative the following question certified by the Circuit Court of Appeals:

"3. Do the recitals in the bonds issued to the Evansville, Carmi and Paducah Railroad Company, [*i. e.*, that the bonds are issued "by virtue of an act" conferring upon the city the power to subscribe for stock and issue bonds] as against a *bona fide* purchaser for value of such bonds, **estop the City of Evansville from asserting that such bonds were**

not issued, for stock subscribed, upon a petition of two-thirds of the resident freeholders of the city, distinctly setting forth the company in which stock was to be taken, and the number and amount of shares to be subscribed? "

And this court also in said case answered in the affirmative the last clause of the fifth question; namely:

" Or had such a purchaser the right to assume, from the recital, that the prerequisites of both the valid act and the invalid act had been observed by the common council before the issuance of such bonds?"

Inasmuch as this case of *Evansville vs. Dennett*, 161 U. S., 434, is controlling, we feel justified in stating the same at considerable length, more especially as the Court held in favor of a *bona fide* holder that, though the bonds recited *a particular resolution of the city council by date*, and though such resolution was by law required to appear on the records of the city, nevertheless the *bona fide* holder of such bonds was not even put upon inquiry as to the terms or contents of such resolution, nor of ordinances also referred to in such bonds.

In that case bonds were issued under the provisions of section 30 of the charter of the city of Evansville, Indiana, approved January 27, 1847, which gave power to take stock in any chartered company for making roads to said city (Report, p. 437, bottom, p. 440, bottom). There were two sets of bonds involved in the Evansville case. Those issued to the Evansville, Henderson and Nashville Railroad Company contained the following recital:

" This being one of a series of three hundred bonds of like tenor and date, issued by the city of Evansville, in payment of a subscription to the Evansville, Hen-

derson and Nashville Railroad Company, made *in pursuance of an act* of the legislature of the State of Indiana and ordinances of the city council of said city passed in pursuance thereof."

The other issue of bonds recited as follows:

"*By virtue of an act* of the general assembly of the State of Indiana, entitled 'An act granting to the citizens of the town of Evansville, in the county of Vanderburg, a city charter,' approved January 27, 1847; and by virtue of an act of the general assembly of the State of Indiana, amendatory of said act, approved March 11, 1867, conferring upon the city council of said city power to take stock in any company authorized for the purpose of making a road of any kind leading to said city; and by virtue of the resolution of said city council of said city, passed October 4, 1869, ordering an election of the qualified voters of said city upon the question of subscribing three hundred thousand dollars to the capital stock of the Evansville, Carmi and Paducah Railroad Company, and said election, held on the 13th day of November, 1868, resulting in a legal majority in favor of such subscription, and by virtue of a resolution of said city council, passed May 23, 1870, ordering an issue of the bonds of the city of Evansville (of which this is a part) to an amount not to exceed three hundred thousand dollars, bearing interest at the rate of seven per cent. per annum, for the purpose of paying the subscription as authorized above. The said city of Evansville hereby acknowledges to owe and promises to pay," &c.

The Supreme Court of the United States held that it must look alone to the city charter of 1847 for the power to issue the bonds, saying (p. 440):

"Under this presentation of the case we put aside the acts of 1865 and 1867, as giving no support to the rights of the plaintiff, and look alone to the charter of 1847."

The court then proceeded to state that this charter gave power to subscribe for stock, but only on petition of two-thirds of the residents of the city, &c., as stated

in section 30 of the charter, quoted in the Report, page 437, bottom.

The questions certified by the Court of Appeals to to the Supreme Court in that case are quoted above in this Brief (pp. 40–41). The Court answered all these questions in favor of the *bona fide* holder.

Quoting from *School District vs. Stone*, 106 U. S., 183, 187, the Court says (p. 443) :

" Bonds issued by municipal officers containing recitals by such officers that the bonds have been issued ' in pursuance of,' or ' in conformity with,' or ' by virtue of,' or ' by authority of,' the statute have been held in favor of *bona fide* purchasers for value **to import full compliance with the statute, and to preclude inquiry** as to whether the precedent conditions had been performed before the bonds were issued," citing various cases.

Then, referring to the case in hand, the court adds *(Ib.*, p. 443*)*:

" As, therefore, the recitals in the bonds import compliance with the city's charter, purchasers for value having no notice of the nonperformance of the conditions precedent, were not bound to go behind the statute conferring the power to subscribe, and to ascertain, by an examination of the ordinances and records of the city council, whether those conditions had, in fact, been performed. With such recitals before them they had the right to assume that the circumstances existed which authorized the city to exercise the authority given by the legislature."

We call the special attention of the Court to the fact that the precise question put by the Circuit Court of Appeals to the Supreme Court of the United States in this case of *Evansville vs. Dennett*, in the first question above quoted, was whether the recital in the bonds

that they were issued under " ordinances of the City Council put a purchaser upon inquiry as to the terms of the ordinances under which the bonds were issued." Also, that the second question submitted was whether the recital in the other series of bonds that they were issued " by virtue of a resolution of said City Council, passed May 23, 1870," thus specifying and referring to the resolution by the exact date thereof, " put a purchaser upon inquiry as to the terms of that resolution and charge him with knowledge of its terms."

The Supreme Court of the United States answered both these questions in the negative. In other words, the Supreme Court of the United States has, in this case as in others, distinctly and emphatically laid down the doctrine that, while a purchaser of such negotiable bonds must examine to see if the constitution and statutes of the State confer authority to issue such bonds, and must also examine the form of the bonds and see what appears upon the face thereof, yet if the said bonds on their face conform to the statute and constitution and recite that they are issued " by virtue of " or " in pursuance of," &c., &c., authority of the provisions of a statute, the holder is not bound to go behind the statute conferring the power and ascertain by an examination of the ordinances, resolutions and proceedings of the City Council whether the city has complied with the provisions of the statute, or whether the facts exist which are required by the statute in order that bonds be issued.

Fundamental Principles of the Law of Negotiable Paper as Applicable to this Case.

These and other decisions of the Supreme Court of the United States are made in view of the great and fundamental principle involved in the negotiability of municipal bonds like other negotiable paper. The bonds are designed to pass from hand to hand upon payment of value therefor. The holder must look for constitutional and statute authority for the issue of the bonds, and must look at the bonds that he is buying, but he is not bound to look beyond this if the recitals in the bonds import a compliance with the constitution and statutes. Consider for a moment what an unreasonable and impracticable burden any other rule or principle would put upon the purchaser of municipal bonds. Nobody would be safe in buying them unless he or his attorney went personally and examined all the records of the municipality. In the present case this would have meant that the purchasers of these bonds would have to make a journey across the continent to examine all the records of the municipality. How many bonds would any municipality be enabled to sell if this were the law? The practical effect of any such rule would be to render all negotiable bonds non-negotiable. If a State desires that its municipalities shall not issue negotiable bonds it is very easy for the legislature so to provide; but, as was said by Mr. Justice HARLAN in the case of *Gunnison County Commissioners vs. E. H. Rollins & Sons*, 173 U. S., 255, 276:

"Indeed, it is entirely competent for a State to provide by statute that all obligations, in whatever form executed by a municipality existing under its laws,

shall be subject to any defense that would be allowed in cases of non-negotiable instruments. But for reasons that every one understands no such statutes have been passed. Municipal obligations executed under such a statute could not be readily disposed of to those who invest in such securities."

Nothing Peculiar in the Case at Bar as to Keeping Records.

But it may be objected that in the present case the California statute required that "the notice of such election shall recite the indebtedness to be refunded." The court says that the action of the mayor and council was by ordinance, and that such ordinance was a part of the public records of the city, which by its charter are required to be kept "in large, well-bound, uniform and suitable books" (Opinion of Circuit Court of Appeals, Record, p. 314).

These provisions, however, are not peculiar to the present case. In the *Evansville Case*, 161 U. S., 434, the charter of the city of Evansville, **the very statute under which the bonds there in question were issued** (S. L. Ind., 1847, p. 9, § 26), provided, among other things, as follows:

"The common council shall keep a full and fair record of all their proceedings, and for this purpose shall appoint some person not of their body a clerk, who, before entering upon the discharge of his duties as such, shall take an oath of office, and give bond, with security to the acceptance of the common council, to secure the proper performance of his duties. The clerk shall attend all meetings of the council, and make and keep a record of their proceedings; and the minutes of the proceedings of each meeting being recorded, shall be read over in the presence of the council, and if incorrect, corrected, and when found correct, or made so, shall be signed by the mayor or other presiding officer of the meeting, and attested by the clerk, or other person acting as such.

"SEC. 27. It shall also be the duty of the clerk to safely keep and preserve all records, books, and papers belonging to the city of Evansville, and appertaining to or deposited in his office, entire and without injury or mutilation, and to hand them over, together with all other property of said city in his hands, to his successor, and to do and perform all other things and duties that he may be required to do by the by-laws, ordinances, rules, and regulations to be passed, ordained, and established by said common council: This act shall be deemed and taken to be a public act, and as such may be read as evidence in any court, without being pleaded or particularly referred to in pleading; and the printed by-laws and ordinances passed and ordained by said common council, and purporting to be printed by the order and under the authority of said common council shall be received and read in all courts as *prima facie* evidence without being specially pleaded or referred to in pleading: and transcripts of the records and proceedings of the said common council, certified by the mayor, under the corporate seal, shall be evidence in all courts, in like manner as the original would be, without other proof or authentication than such certificate and seal."

In the said case of *Evansville vs. Dennett*, 161 U. S., 434, the question presented to the Supreme Court of the United States was whether the ordinances and resolutions (kept of record under these express provisions of the charter of the city of Evansville above quoted) must be examined by the holder of a bond, which recited that it was issued under or by virtue of the charter of the city of Evansville. The Supreme Court held that the *bona fide* holder of such bond need not make such examination.

Note that in this **Evansville case the very act under which the bonds were issued required full and complete records to be kept.** It is not stated in the opinion of the Supreme Court, nor did that Court deem it material to state in its opinion what the ordinances of the city of Evans-

ville would have shown, or what the resolution of May 23, 1870, would have shown to the *bona fide* holders if they had been examined. What the Court held was that they **need not be examined for any purpose,** no matter what they contained ; that all that the *bona fide* holder of the bond needed to examine was the constitution and statute and the bond.

Hackett vs. Ottawa is a case directly in Point for the Petitioner.

The case of *Hackett vs. Ottawa*, 99 U. S., 86, unanimously decided by this court, Mr. Justice HARLAN delivering the opinion, is precisely in point. That case involved the validity of certain negotiable bonds issued by the city of Ottawa, Illinois. Under the charter of the city and the constitution of the State there was power to issue bonds for corporate purposes of the city. The bonds in question which had been issued by the city recited, among other things, that they were issued (p. 86) " by virtue of the charter of said city," also " in accordance with a certain ordinance passed by the city council of said city on the 15th day of June, A. D. 1869, entitled ' An ordinance to provide for a loan for municipal purposes,' which ordinance was ratified by a majority of all the qualified voters of said city at an election holden on the 20th day of July, A. D. 1869, and in conformity with an ordinance passed by the city council of said city on the 30th day of July, 1869, entitled ' An ordinance to carry into effect the ordinance of June 15, 1869, entitled " An ordinance to provide for a loan for municipal purposes." ' " **The defendant pleaded as a defense to the said bonds that they were in fact issued and donated to one**

Cushman or the Ottawa Manufacturing Company, and that they were not issued for any municipal purpose whatever, and it was claimed that these facts appeared from the ordinance whose date and title were given on the face of the bonds. This court however, held that no such defense could be made as against the *bona fide* holder of the said bonds. Mr. Justice HARLAN, giving the opinion of the court says (pp. 90, 91):

"The bonds in suit upon their face import: 1st, That the faith of the city is irrevocably pledged for their payment. 2d, That they were issued in pursuance of the power which the council possessed to borrow money on the credit of the city and issue bonds therefor, and also in accordance with certain ordinances which provided for a loan for *municipal* purposes. The recitals of the bonds, in themselves, furnish no ground whatever to suppose that the council transcended its authority, or issued them for other than such purposes. They justify the opposite conclusion.

"The city, however, claims that they were not issued for municipal purposes, but as a simple donation to a private corporation, formed for business ends solely, and in no wise connected with or under the control of the city,—all of which, it is further claimed, appears from the ordinances, whose date and title are given in the face of the bonds.

"The ordinance of June 15, 1869, authorizes the mayor to borrow, in the name, for the use, and upon the bonds of the city, the sum of $60,000, 'to be expended in developing the natural advantages of the city for manufacturing purposes.' * * * The ordinance of July 30, 1869, was to carry into effect that of June 15, 1869. It directed the mayor to deliver the bonds to one Cushman, 'to be used by him in developing the natural resources of the surroundings of the city, and that the said Cushman is authorized and directed to expend the sum in the improvement of the

water-power upon the Illinois and Fox Rivers within the city and in the immediate vicinity thereof, under the franchises and powers which have been granted for that purpose, in the manner which, in his judgment, shall best secure the practical and permanent use of said water-power in the city and its immediate vicinity."

It was contended, among other things, by the holders of the bonds that these were proper corporate purposes of the city. This Court, however, did not decide that question, Mr. Justice HARLAN saying (pp. 95, 96):

"But a direct decision of that question does not seem to be essential to the disposition of this case. We content ourselves with stating the propositions which counsel have urged upon our consideration, and without expressing any settled opinion as to what are corporate purposes within the meaning of the Illinois constitution, we pass to another point, which, in our judgment, is fatal to the defense. It is consistent with the pleas filed by the city that the testator of plaintiffs in error purchased the bonds before maturity for a valuable consideration, without any notice of want of authority in the city to issue them, and without any information as to the objects to which their proceeds were to be applied, beyond that furnished by the recited titles of the ordinances. For all corporate purposes, as we have seen, the counsel, if so instructed by a majority of voters attending at an election for that purpose, had undoubted authority, under the charter of the city, to borrow money upon its credit and to issue bonds therefor. **The bonds in suit, by their recitals of the titles of the ordinances under which they were issued, in effect, assured the purchaser that they were to be used for municipal purposes, with the previous sanction, duly given, of a majority of the legal voters of the city. If he would have been bound, under some circumstances, to take notice, at his peril, of the provisions of the ordinances, he was relieved from any responsibility or duty in that regard by reason of the**

representation, upon the face of the bonds, that the ordinances under which they were issued were ordinances 'providing for a loan for municipal purposes.' Such a representation by the constituted authorities of the city, under its corporate seal, would naturally avert suspicion of bad faith upon their part, and induce the purchaser to omit an examination of the ordinances themselves. It was, substantially, a declaration by the city with the consent of a majority of its legal voters, that purchasers need not examine the ordinances, since their title indicated a loan for municipal purposes. The city is therefore estopped, by its own representations, to say, as against a *bona fide* holder of the bonds, that they were not issued or used for municipal or corporate purposes. It cannot now be heard, as against him to dispute their validity. **Had the bonds, upon their face, made no reference whatever to the charter of the city, or recited only those provisions which empowered the council to borrow money upon the credit of the city and to issue bonds therefor, the liability of the city to him could not be questioned. Much less can it be questioned, in view of the additional recital in the bonds, that they were issued in pursuance of an ordinance providing for a loan for municipal purposes; that is, for purposes authorized by its charter.** *Supervisors v. Schenck*, 5 Wall. 772. It would be the grossest injustice, and in conflict with all the past utterances of this court, to permit the city, having power under some circumstances to issue negotiable securities, to escape liability upon the ground of the falsity of its own representations, made through official agents and under its corporate seal, as to the purposes with which these bonds were issued. Whether such representations were made inadvertently, or with the intention, by the use of inaccurate titles of ordinances, to avert inquiry as to the real object in issuing the bonds, and thereby facilitate their negotiation in the money markets of the country, in either case, the city, both upon principle and authority, is cut off from any such defense. What this court declared, through Mr. Justice CAMPBELL, in *Zabriskie v. Cleveland, Columbus & Cincinnati Railroad Co.* (23 How, 381), as to a private corporation, and repeated, through Mr. Justice CLIFFORD, in *Bissell v. City of*

Jeffersonville (24 *Id.* 287), as to a municipal corporation, may be reiterated as peculiarly applicable to this case: **"A corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind; and can not, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced."**

The charter of the City of Ottawa contains the usual provisions as to keeping, and publishing from time to time a journal of its proceedings, especially ordinances authorizing the issue of bonds, as will appear by extracts from the charter of that city, given in the foot note.*

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* ART. 2, SEC. 9. The city council shall keep a journal of its proceedings, and from time to time publish the same, and the yeas and nays, when demanded by any member present, shall be entered upon the journal.

ART. 5, SEC. 3. The city council shall have power * * * * * to borrow money on the credit of the city, and to issue bonds therefor, and pledge the revenue of the city for the payment thereof.

ART. 5, SEC. 38. The city council shall have power to make all ordinances which shall be necessary and proper for carrying into execution the powers specified in this act, so that such ordinances be not repugnant to nor inconsistent with the constitution of the United States or this state.

ART. 5, SEC. 40. All ordinances passed by the city council shall, within one month after they have been passed, be published in some newspaper in the city, and shall not be in force, except as aforesaid, until they have been published as aforesaid.

ART. 5, SEC. 41. All ordinances of the city may [be] proven by the seal of the corporation, and when printed or published in book or pamphlet form, and purporting to be published by authority of the corporation as in force, the same shall be received in evidence in all courts and places without further proof.

ART. 10, SEC. 20. No money shall be borrowed by the city council until the ordinance passed therefor shall be submitted to and voted for, by a majority of the voters of said city, attending an election held for that purpose.

Charter of City of Ottawa, Session Laws, Illinois, 1853, p. 296.

Graves vs. Saline County, 161 U. S., 359, is in point and controlling.

We next call the special attention of the court to the case of *Graves vs. Saline County*, 161 U. S., 359 (1896), for the following reasons:

1. That case, like the case now under consideration, involved the validity of *refunding bonds*, which stand upon a peculiarly favored footing.

2. The bonds which were refunded in that case had been decided by the Supreme Court of Illinois, 84 Ill., 292, and were admitted by the Supreme Court of the United States, 128 U. S., 526, 538, as stated in *Graves vs. Saline County*, 161 U. S., 359, 372, to have been void and uncollectible even in the hands of *bona fide* holders.

3. The recitals in the bonds which were held valid in *Graves vs. Saline County* were that they were issued "*for the purpose of funding and retiring certain binding, subsisting, legal obligations of said county*," etc.; and the recital in the bonds in the present case is that they are issued "*for the purpose of refunding the bonded indebtedness of said city and issuing bonds therefor, and providing for the payment of the same under and in pursuance of and in conformity with the provisions of an act of the legislature of the State of California*" (citing the title of said act approved March 1, 1893). The defense of the city in the present case, contrary to the recital in the bonds, is that part of the old bonds refunded were not "bonded indebtedness of said city, just the same as in the case of *Graves vs. Saline County*, the defense attempted there, contrary to the

recital in the bonds, was that the old bonds of the Belleville and Eldorado Railroad Company refunded thereby were not valid bonds of the county, and hence could not be refunded under the Illinois act, which authorized counties to refund their outstanding bonds. The bonds now in suit also contain the recital that "all acts, conditions and things required by law to be done precedent to and in the issue of said bonds have been properly done, happened and performed in due and legal form as required by law."

4. The statute under which the Saline County refunding bonds were issued required a record to be kept containing matters which if the bondholder was bound to notice would have shown the invalidity of the bonds which were refunded in that case.

As we consider the case of *Graves vs. Saline County* to be controlling and decisive in its facts and in its principles of the case at bar, we now state the same at considerable length. In that case the facts were that the County of Saline, State of Illinois, had issued $195,000 funding bonds under an act of February 13, 1865, and acts amendatory thereof, approved April 27, 1877, and June 4, 1879. These $195,000 of bonds were issued to fund one set of bonds formerly issued by the county in payment of the subscription to stock of the St. Louis and Southeastern Railway Company, and another set of bonds issued by the county to the Belleville and Eldorado Railroad Company. The Supreme Court of the United States expressly held and stated that the set of bonds issued to the Belleville and Eldorado Railroad Company were absolutely void even in the hands of *bona fide* holders, the court stating (p. 373) :

"If the present case stood only on the footing of the original conditional contract of subscription, we would be compelled to follow the holding of the Supreme Court of Illinois, and to hold that *the original bonds were uncollectible even by innocent holders.*"

The Supreme Court then proceeded to state and consider the fact that the said void bonds had been funded under the said statutes and by authority of a vote of the people of the County, and expressly held and decided that the funding bonds so issued were valid bonds of the County in the hands of *bona fide* holders. The questions certified by the Circuit Court of Appeals on this point were as follows (p. 367):

"FIRST. Is the County of Saline estopped by the recital in the funding bonds to assert that the bonds issued to the St. Louis and Southeastern Railway Company and to the *Belleville and Eldorado Railroad Company*, respectively, and for which the funding bonds were exchanged, were not binding, subsisting legal obligations of said county?

"SECOND. *Are the funding bonds so issued by the County of Saline legal, valid and binding obligations upon said county in the hands of a bona fide holder for value before maturity?*

"THIRD. If the court should be of opinion that the funding bonds are invalid, would it be competent for the court in this cause, which is a suit in equity instituted by the County of Saline to restrain officers of the law from levying and collecting a tax as required by law to pay the interest upon the funding bonds, to grant the relief asked only upon condition that the County of Saline pay to the holders the amount of the valid bonds issued to the St. Louis and Southeastern Railway Company which were exchanged for the funding bonds?"

And the court said in answering these questions (p. 375):

"We, therefore, answer the second question put to us by the Circuit Court of Appeals in the affirmative, and this renders a formal answer to the other questions unnecessary."

In this case of *Graves vs. Saline County*, the Statutes of Illinois, following the universal rule, required that the action of the county officers in issuing the funding bonds, like all other proceedings of the county, be *entered upon the records of the county*; and, if any one had examined those records and proceedings, he would have seen that those bonds were issued to fund other bonds issued to the Belleville and Eldorado Railroad Company, which last mentioned bonds were absolutely void. Not only so, but the statute under which these Saline County bonds were issued (S. L. Ill., 1879, p. 229, § 4) expressly provided, among other things, as follows:

"Upon the issuing of any new bond, or evidence of indebtedness, the clerk, or other officer having custody of the records of the fiscal matters of such county, city, town, township, school district or other municipal corporation, as the case may be, shall make registration thereof, in a book to be kept in his office for that purpose, showing the date, amount, number, class, date of maturity, rate of interest and place of payment of such new bond, or other evidence of indebtedness, and **the description of the bond or evidence of indebtedness, for which, or for the purchasing or retiring of which, the same was given,** as nearly as practicable."

An examination of this record and register kept of these Saline County funding bonds would have shown that these funding bonds were issued to take up the void bonds issued to the Belleville and Eldorado Railroad Company.

The Old Saline County Bonds Were Void, Even in the Hands of Bona Fide Holders.

The very point of the decision of the Supreme Court of the United States in this case of *Graves vs. Saline County* in regard to such funding bonds was that, although the original bonds which were funded were absolutely void in the hands of *bona fide* holders, yet the *bona fide* holder of the funding bonds was not bound to investigate and ascertain at his peril as to whether the funding bonds were issued to fund a valid debt of the county, but was protected by the fact that the bonds were negotiable and by the recitals contained therein. After the decision of the Supreme Court of the United States in *Graves vs. Saline County*, 161 U. S., 359, the United States Circuit Court of Appeals for the Seventh Circuit, in obedience to the decision of the Supreme Court of the United States, held in favor of the validity of the said bonds (see *Graves vs. Saline County*, 73 Fed. Rep., 920).

Gunnison County Case also a Controlling Authority for the Petitioner in this Case.

In the case of *Gunnison County Commissioners vs. E. H. Rollins & Sons*, 173 U. S., 255 (1899), this court unanimously held that the express recital in the bonds of Gunnison county that they did not exceed in amount the limit prescribed by the constitution of the State of Colorado estopped the county from showing by its records or other facts outside of the bonds themselves that the bonds themselves were in excess of the

limit. In that case also it was urged by the defendant county that the county was obliged to keep records which were public and open to all purchasers of bonds, and these records were introduced in evidence before the trial court as showing that the bonds had been issued in excess of the constitutional limit, and that they were therefore void. This court held that such admission of these records was error, and that the county was estopped by the recital in the bonds from making any such defense, although the records, if consulted, might have shown the illegality of the bonds in this respect.

We ask particular attention to the *Gunnison County case*, among other reasons, because it came before this Court on a writ of *certiorari* issued to the Circuit Court of Appeals for the Eighth Circuit. This Court considered the question involved in the *Gunnison County case* of such great importance that it issued its writ of *certiorari*, to bring the case before this Court for review. The same question precisely is involved in the present case, and is the one on which the present case was decided by both the Circuit Court and the Circuit Court of Appeals, and on which in the present case the Judges in the Ninth Circuit are evenly divided. The *Gunnison County case* involved especially the question whether the purchaser of municipal bonds was bound to notice the records of the municipality pertaining to the issue of such bonds. Additional time was allowed to counsel, and the case was, as this Court will recall, argued with great ability in behalf of the county by Governor THOMAS, of Colorado, and associate counsel, and the question upon which the Court of Appeals made the decision of the present case turn was thoroughly discussed

by counsel and fully and carefully considered by this Court in the said *Gunnison County case.*

We insist that the decision in this case by the Circuit Court of Appeals is directly in the teeth of the *Gunnison County case*, as well as the case of *Evansville vs. Dennett* and the case of *Graves vs. Saline County.* These three cases laid down, indeed, no new doctrine, for the same principle had been laid down by this Court, under substantially the same facts, in the earlier case of *Hackett vs. Ottawa, supra.*

In the case of *Gunnison County Commissioners vs. E. H. Rollins & Sons*, 173 U. S., 255 (in which case we were of counsel for E. H. Rollins & Sons), it was strenuously urged by Governor THOMAS in his brief and in his oral argument on behalf of Gunnison county that the *bona fide* holder of the Gunnison county bonds there in question was bound to examine the orders of the county commissioners of Gunnison county authorizing the issue of the refunding bonds, and that if he had made such examination he would have seen there a certificate of the county commissioners stating the amount of indebtedness of the county, and showing that it was beyond the limit prescribed by the constitution and statutes of the State. He says (His Brief, p. 40):

"Indeed, our contention is that the purchaser of bonds, or any other form of county indebtedness, *is bound to take notice of every county record open to public inspection* which contains a statement of the county indebtedness, whether it be a warrant register setting forth the warrants that are issued from day to day, a bond register setting forth the amount of bonds issued from time to time, the semi-annual statements of indebtedness (which are nothing but trial balances struck twice a year), a certificate required to be made before the bonds are issued, *or any other public record of any kind, nature or description* that is open to the inspection of everyone."

We have said above that the Gunnison case is in point and controls the case at bar. This we have said deliberately because the whole defence of Gunnison County in the case was that the bondholder was bound *under the legislation of Colorado to take notice of the records of the county*, and that if such notice was taken the records would show on their face that the county was indebted beyond the constitutional limit, and to this end the defendant county introduced these records in evidence, and the whole stress of the case was whether under the recitals in the bonds a *bona fide* holder thereof was bound to take notice of the records, and this Court held that he was not. In support of his contention Governor THOMAS cited the same cases that are cited in the opinion of the Circuit Court of Appeals in the present case, to wit: The case of *Dixon County vs. Field*, 111 U. S., 83, also the case of *Sutliff vs. Lake County Commissioners*, 147 U. S., 230. Governor THOMAS also cited the general county act of Colorado as to publishing and entering of record a statement of the county indebtedness, which act applied to every county in the State. It applied as much to *Gunnison* county as it did to *Lake* County, the defendant in the case of *Sutliff vs. Lake County Commissioners*. Section 30 of the said statute of the State was as follows:

"An act concerning counties, county officers and county government and repealing laws on these subjects, approved March 24, 1877.

* * * * * *

"SEC. 30. It shall be the duty of the Board of County Commissioners of *each county* to make out semi-annual statements at the regular sessions in January and July, at which times they shall have such statement published in some weekly newspaper published in the county, if there be such published; and, if there be no newspaper published in the county, such Commission-

ers shall cause such statements to be posted in three conspicuous places in said county, one of which shall be the Court House door, and *such statement shall show the amount of debt owing by their county*, in what the debt consists, what payments, if any, have been made upon the same, the rate of interest that such debts are drawing, also a detailed account of the receipts and expenditures of the county for the preceding months, in which shall be shown from what officer and on what account any money has been received, and the amounts, and to what individuals and on what account any money has been paid, and the amounts; and shall strike the balance, showing the amount deficit, if any, and the balance in the treasury, if any, and the *statement thus made, in addition to being published as before specified, shall also be entered of record* by the Clerk of the Board of County Commissioners in a book to be by him kept for that purpose only, which book shall be open to the inspection of the public at all times *(Session Laws, Colorado 1877, pp. 218, 227)*."*

Governor THOMAS urged (and, of course, correctly on this point) that this Section 30 applied to *every county*, Gunnison County as well as Lake County. He also urged that the debt statements made under this section constituted a public record, of which every bond purchaser had constructive notice. He also argued that all other "records" of the county were constructive notice, especially the orders of the county board of commissioners authorizing the refunding bonds.

This *Gunnison county case* was argued at the bar at great length by a large number of counsel, extra time being given by the court for the purpose, and the Supreme Court finally rendered its decision, in which it

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* The above Section 30 is carried into the General Laws Compilation of 1887 and numbered therein as Section 457 of such Compilation.

held that the Gunnison county bonds were valid in the hands of *bona fide* holders, holding among other things, that the *bona fide* holder was not bound to examine the orders, proceedings or records of the county, nor the so-called financial statements entered upon the records of the county, although, if he had consulted them, he might have had notice that the refunding bonds were issued to refund invalid warrants. This decision in the *Gunnison county case* proceeds upon the true and correct ground of giving full meaning and effect to the negotiability of municipal bonds and to the recitals therein. This is a distinct decision to the effect that the holder of negotiable bonds is not bound to examine the ordinances, orders, resolutions and other proceedings for the issue of the bonds. The court, HARLAN, J., in concluding its unanimous opinion, says (p. 275):

"It is insisted with much earnestness that the principles we have announced render it impossible for a State by a constitutional provision to guard against excessive municipal indebtedness. By no means. If a State constitution, in fixing a limit for indebtedness of that character, should prescribe a definite rule or test for determining whether that limit has already been exceeded or is being exceeded by any particular issue of bonds, all who purchase such bonds would do so subject to that rule or test, whatever might be the hardship in the case of those who purchased them in open market in good faith. Indeed, it is entirely competent for a State to provide by statute that all obligations, in whatever form executed by a municipality existing under its laws, shall be subject to any defense that would be allowed in cases of non-negotiable instruments. But, for reasons that every one understands, no such statutes have been passed. Municipal obligations executed under such a statute could not be readily disposed of to those who invest in such securities."

The opinion of the court does not expressly enumerate all the orders, financial statements, records and

proceedings which the defendants introduced in evidence over the objections and exceptions of the plaintiff in that case. In regard to these the court says (p. 276):

"What has been said renders it unnecessary to consider various questions arising upon exceptions to specific rulings in the Circuit Court as to the admission and exclusion of evidence, and as to those parts of the charge to which objections were made. *Those rulings are inconsistent with the principles herein announced.*"

California Case Directly in Point in Plaintiff's Favor.

In *State of California vs. Wells, Fargo & Company*, 15 Cal., 336 (1860), the Supreme Court of California held that bonds issued by the state to fund warrants of the state were negotiable instruments and binding upon the state, although the warrants which had been refunded had been so refunded by mistake by the state treasurer, said warrants having been theretofore paid and cancelled, and, after such payment and cancellation, having been stolen from the office of the treasurer, and presented for funding, and having been funded by the issue of the bonds. The court says (p. 341):

"These bonds, issued under the circumstances, are unquestionably negotiable instruments and binding upon the State, in the hands of an innocent assignee. The principle has been settled in the cases of *Delafield v. The State of Illinois;* (8 Paige, 533); 2 Hill, 177; 26 Wend. 192 and in other cases."

It was urged on behalf of the state that Wells, Fargo & Company, who innocently received the paid and stolen warrants, and received the funding bonds in

place thereof, were bound to know the facts, and ought to have searched the records of the state. On this point the Supreme Court said (p. 342):

"It is said that the defendants were bound to know the facts. We do not perceive the force of this suggestion, or why they should be held to any greater knowledge than the regular agents of the State, whose office and duty it was to ascertain the facts, and to protect the public interests. But it cannot be held that every man who deals with State securities is bound to search the books and records of the State officers before proceeding to take an assignment of the claim against the State."

Wesson vs. Saline County, also in Point in Plaintiff's Favor.

In *Wesson vs. Saline County*, 34 U. S. App., 680, 73 Fed. Rep., 917, before HARLAN, WOODS and JENKINS, JJ. (1896), in the Circuit Court of Appeals for the Seventh Circuit, the constitution and statutes of Illinois applicable to the bonds there in question authorized a *subscription* to the capital stock of a railroad company, but did not authorize a *donation*. **An examination of the proceedings and orders of the county court of Saline county would have shown to any one that the bonds were issued for a donation.** The precise question was whether the holder of the bonds, with the recitals therein contained, was bound to make such examination. If he was, then the bonds were invalid, even in the hands of a *bona fide* holder. The Circuit Court of Appeals for the Seventh Circuit had formerly decided a number of cases in which they had held such bonds invalid, even in the hands of a *bona fide* holder; but after the decision of the Supreme Court of the

United States in the case of *Evansville vs. Dennett*, 161 U. S., 434, the Circuit Court of Appeals for the Seventh Circuit reversed its former decisions, holding them overruled by the Supreme Court of the United States in *Evansville vs. Dennett*, and held that a *bona fide* holder of such bonds, with such recitals, was not bound to examine the records of the county for any purpose, and the bonds were held valid in the hands of such *bona fide* holder.

In a note at the end of the decision, it is stated that "Mr. Justice HARLAN sat at the hearing, but did not participate in the decision."

The Circuit Court of Appeals for the Seventh Circuit had previously held in *Post vs. Pulaski County*, 9 U. S. App., 1, that the

"recital in the bonds that they were issued pursuant to an order of the county court put whosoever should come into possession of those bonds, even if purchased for value in the open market, upon inquiry as to the terms of that order.

This holding the Supreme Court of the United States overruled in *Evansville vs. Dennett*, *supra*.

In giving its opinion in the *Evansville case* the Court also says (p. 443):

"As therefore the recitals in the bonds import compliance with the city's charter, purchasers for value having no notice of the non-performance of the conditions precedent, were not bound to go behind the statute conferring the power to subscribe, and to ascertain, by an examination of the ordinances and records of the City Council, whether those conditions had, in fact, been performed. With such recitals before them they had the right to assume that the circumstances existed which authorized the city to exercise the authority given by the Legislature."

This decision of the Supreme Court of the United States, made upon great deliberation, and overruling

prior decisions of the Circuit Court of Appeals of the Seventh Circuit from which the *Evansville case* came, fully accords with and follows its prior decisions, and it completely negatives the position taken by the City of Santa Cruz when it asserts that the plaintiff, as the *bona fide* holder of the bonds and coupons in question, is put upon inquiry as to the terms of the ordinances, notices and resolutions under which these bonds were issued, and charged with knowledge of their contents.

Note that the recitals in the bonds in the case of Evansville vs. Dennett were very much weaker than the recitals in the bonds now in question ; and yet the Court had no hesitation in arriving at the conclusion that the bona fide holder was protected by even those recitals in the bonds, and was not bound to consult the ordinances and resolutions of the City Council.

After this decision by the Supreme Court of the United States, the case of *Wesson vs. County of Saline*, 73 Fed. Rep., 917, came before the United States Circuit Court of Appeals for the Seventh Circuit. That case was similar to the case of *Post vs. Pulaski County*, *supra*, and the Circuit Court of Appeals, WOODS, J., said (p. 919) :

" But the proposition enunciated in Post vs. Pulaski County, that ' the recital in the bonds that they were issued pursuant to an order of the County Court put whosoever should come into possession of those bonds, even if purchased for value in the open market, upon inquiry as to the terms of that order,' is inconsistent with, and

must be regarded as overruled by the recent ruling of the Supreme Court in the case of City of Evansville vs. Dennett, supra, where it was held that a recital that a subscription to the stock of a railroad company was 'made in pursuance of an act of the Legislature and ordinances of the City Council, passed in pursuance thereof * * * imported not only compliance with the act of the Legislature, but that the ordinances of the City Council were in conformity with the statute.' That is necessarily so, if the recitals in municipal bonds are not to be denied significance. The only reason for saying that a reference to an ordinance puts a party upon inquiry into the contents thereof is because the reference conveys knowledge of the existence of the ordinance. But Common Councils, Boards of Commissioners and like municipal bodies can act only by order, ordinance or resolution, as every one is bound to know; and, when a municipal bond is offered upon the market, it needs no mention in a recital to give a proposed purchaser notice that the bond was issued in pursuance of an order, or resolution, or ordinance. The existence of the bond implies that much, and when there is a recital to the effect that the bond was issued in pursuance of a statute, the necessary import is that there was an ordinance, and a proper one, whether express mention is made of it or not. To say, 'in pursuance of a statute and an ordinance,' is equivalent to an express statement that the ordinance is in conformity with the statute, and the purchaser of a bond containing that recital is not bound in that particular to look for further information."

Nothing Peculiar in this Case as to Any Record to be Kept by the Municipality, or to take it out of the Established Doctrine of this Court.

As stated above *(ante,* p. 13*)*, Circuit Judge GILBERT gave a dissenting opinion in the present case (Record, p. 316), to which we call the special attention of this court, and which we submit is both on principle and

authority conclusive in favor of the validity of these bonds. The learned Judge cites numerous cases of this court supporting his opinion. Among other things, he says (Record, p. 320) :

"In the latter case [*Evansville vs. Dennett*, 161 U. S., 434,] the bonds contained the recital that they were issued by virtue of a certain designated act of the legislature as well as by virtue of a resolution of the city council, ordering an election of the qualified voters of the city, which resulted in a legal majority in favor of such subscription. The court said: 'As therefore the recitals in the bonds import compliance with the city's charter, purchasers for value having no notice of the non-performance of the conditions precedent, were not bound to go behind the statute conferring the power to subscribe, and to ascertain, by an examination of the ordinances and records of the city council, whether those conditions had, in fact, been performed. With such recitals before them they had the right to assume that the circumstances existed which authorized the city to exercise the authority given by the legislature.' "

We do not quote the whole of Judge GILBERT'S opinion, but respectfully request this court to read it in its entirety. He says among other things (Record, p. 317) :

"In the present case the opinion of the majority of the court seems to have been influenced by the fact that by the charter of the city of Santa Cruz a public record of its ordinances is required to be kept in books accessible to the public, and by the further fact that the city officers who were impliedly authorized to issue the refunding bonds were not expressly empowered to make any certificate or representation to prospective purchasers in respect to the character of the indebtedness for the payment of which the refunding bonds were issued. As far as the first consideration is concerned, it is sufficient to say that the charters of all municipal corporations require similar public records of their proceedings, and that such was undoubtedly the case with the city of Ottawa; yet in *Hackett v. Ottawa*, the court deemed that fact im-

material to the question which was before it, held that a purchaser of bonds was not bound to inspect such records, and disposed of the case upon the general principles of estoppel applicable to all cases. Neither can any distinction between that case and the case at bar be predicated upon the fact that the act of March 1st, 1893, under which the refunding bonds of the city of Santa Cruz were issued, conferred no express power upon the officers of the city to certify to any particular fact in connection with the proceedings on which the bonds were issued, or to make any recitals whatever upon the bonds. The proceedings were had under a statute that not only conferred authority to refund the bonded indebtedness but imposed a duty upon the city to determine whether the occasion had arisen to refund, and if so, to determine wherein the bonded indebtedness consisted, and the nature and amount thereof. Under this authority the city determined that the Water Company's bonds were a portion of its bonded debt, and as such subject to be refunded. The officers of the City of Santa Cruz who executed the refunding bonds were the officers whose duty it was to issue them. Before doing so they were obliged to determine for themselves that the antecedent steps had been taken which were indispensable to the issuance thereof, and they were empowered by an ordinance of the city to recite upon the bonds the facts usually recited upon such instruments—the facts upon which the purchaser was authorized to proceed and on which he might rely as was done in the Ottawa case. The bonds were executed under the seal of the city and were signed by the mayor and the city clerk. These were the officers whose duty it was to sign such instruments. Said the court in the *Town of Coloma v. Eaves*, 92 U. S. 484, 488: 'At some time or other, it is to be ascertained whether the directions of the act have been followed; whether there was any popular vote; or whether a majority of the legal voters present at the election did, in fact, vote in favor of the subscription. The duty of ascertaining was plainly intended to be vested somewhere, and once for all; and the only persons spoken of who have any duties to perform respecting the election, and action consequent upon it, are the town clerk and the supervisor or other executive officer of the city or town. It is a fair presumption, therefore, that the legislature intended that those officers, or one of them at least, should determine

whether the requirements of the act prior to a subscription to the stock of a railroad company had been met.' The bonds in question in the present case contain a recital that they were issued 'for the purpose of refunding the bonded indebtedness of said city,' in pursuance of the act of March 1st, 1893, 'and in pursuance of, and in conformity with, the constitution of the state of California, and the ordinances of the city of Santa Cruz, and in pursuance of, and in conformity with, a vote of more than two thirds of all the qualified electors of said city, etc.,' and contained the certificate, 'that all acts, conditions, and things required by law to be done precedent to, and in the issue of said bonds, have been properly done, happened and performed, in legal and due form, and as required by law.' Here is a distinct certificate that the bond was issued for the purpose of refunding the bonded indebtedness of the city. This recital was expressly authorized by an ordinance of the city before the bonds were issued."

The learned Judge thus states and shows, and we also show in this brief, that there *is nothing peculiar in the charter of Santa Cruz as to a public record of its ordinances being kept.* The same thing is true of every municipality, and has been true in all the numerous cases decided by this court, in regard to the effect of recitals in negotiable municipal bonds.

Officers of municipalities charged with the duty of issuing bonds have power to make recitals therein, and it is not necessary that the statute give express power to make recitals.

It was strenuously urged by counsel for Gunnison County in the case of *Gunnison County Commissioners vs. E. H. Rollins & Sons*, 173 U. S., 255, that county officers had no power or authority conferred either by constitution or statute to make any recital on the

question whether the debt limit prescribed by the constitution had been exceeded. It was urged that to permit such power would be to permit a mere officer of a municipality to recite away the provisions of the constitution. But the Supreme Court of the United States distinctly held contrary to this argument, and held such power to exist. There was not in that case any express power conferred either by constitution or statute upon the county officers to make findings and recitals in the bonds, yet the Supreme Court of the United States had no hesitation in holding that such power existed. This power to make the recitals results from the mere fact that these matters are by the statute committed to the officers of the municipality. The constitution and the statutes contemplate that some body of men shall act for and on behalf of the municipality. There is no other administrative or executive body to represent the city or to speak for it in city matters. They are the agents of the city elected by the people of the city and identified with the city, and the city is bound by their acts and representations made in the performance of the duties committed to them by the statutes. Inasmuch as the city has chosen its own officers and agents, and hold these out to the public as their duly accredited agents and officers, the people of the city, alike by every principle of law and morality, are bound and estopped by the acts and representations of such officers and agents as against innocent third persons with whom they have dealt in city matters. The city and the people of the city held out these officers as representing the city and cannot be heard to assert the contrary.

In order that officers or boards of municipalities may have power to make findings and recitals in bonds it is not necessary that the statutes expressly confer upon such officers or boards power to make such findings and recitals. The fact is, as stated by the Supreme Court of the United States, that "such express direction and authority are seldom found in acts providing for the issuing of bonds." On this point it is enough in this Court to refer to the decision and language of the Supreme Court of the United States in *Bernards Township vs. Morrison*, 133 U. S., 523, 527, as follows:

"It were useless to refer to the long list of cases in which recitals, like these, have been held sufficient to sustain bonds in the hands of *bona fide* holders. It is urged that these commissioners were not elected by the people; that they were not the general officers of the township, but were special officers appointed by the Circuit Court—special agents as it were, for the specific purpose; **that the statute does not in terms give them authority to determine whether the preliminary conditions have been complied with**; and that this case is, therefore, to be distinguished in these respects from those cases where similar recitals have been held conclusive. But though not the ordinary officers of the township, they were the ones to whom by legislative direction was given full authority in the matter of issuing bonds. The organization of townships, the number, character and duties of their various officers, are matters of legislative control; and it is not doubtful that officers appointed represent the municipality as fully as officers elected. When the legislature has declared how an officer is to be selected, and the officer is selected in accordance with that declaration, his acts, within the scope of the powers given him by the legislature, bind the municipality. But these special commissioners were not the only officers of the township whose acts gave currency to these bonds. If inquiry had been directed to the county and township records the affidavit of the township assessor to the consent required would have been found; and on the

face of the bonds it appears that the county clerk of the county has added his official certificate to their validity; so that the acts of general as well as of special officers and agents of the township are the foundation upon which rests the validity of these bonds.

"While it is true that the act does not in terms say that these commissioners are to decide that all preliminary conditions have been complied with, yet such express direction and authority is seldom found in acts providing for the issuing of bonds. It is enough that full control in the matter is given to the officers named. In the case of *Oregon vs. Jennings*, 119 U. S., 74, 92, the rule is thus stated by Mr. Justice BLATCHFORD: 'Within the numerous decisions by this court on the subject, the supervisor and the town clerk, they being named in the statute as the officers to sign the bonds, and the "corporate authorities" to act for the town in issuing them to the company, were the persons entrusted with the duty of deciding, before issuing the bonds, whether the conditions determined at the election existed. If they have certified to that effect in the bonds, the town is estopped from asserting, as against a *bona fide* holder, that the conditions prescribed by the popular vote were not complied with."

"Whatever may be the hardships of this particular case, to sustain the defenses pressed would go far towards destroylng the market value of municipal securities. We see no error in the ruling of the Circuit Court, and its judgment is therefore affirmed."

The express and specific recitals in the bonds, as well as the general recitals, estop the city from showing that part of the bonds refunded were not bonds of the city.

The bonds in the present case expressly recite not only that they are

"issued by the said city of Santa Cruz for the purpose of refunding **the bonded indebtedness of said city**" (the exact language of the statute), but also that they are

"issued * * * under and in pursuance of, and in conformity with, the provisions of an act of the legislature of the State of California, entitled," &c.

and also specifically recite as to the notice of election:

"Notice thereof having been duly and legally given and published in the manner as required by law."

Under the numerous decisions of the Supreme Court of the United States the *bona fide* holder of these bonds was not bound to look further and to examine the ordinances or notice of election authorizing these bonds. These bonds expressly and specifically recite that they are issued to refund **"the bonded indebtedness of said city."** This recital estops the city from asserting that what was refunded was not "the bonded indebtedness of said city." So also these bonds expressly and specifically recite **"notice thereof** [that is, of the election] **having been duly and legally** given and published in the manner required by law." This recital also estops the city from showing that the notice of election was not "duly and legally given;" in other words, provided for voting upon refunding such bonds only as the statute authorized to be refunded. So, also, the general recital that the bonds are **"issued * * * under and in pursuance of and in conformity with the provisions of an act entitled,"** &c., estops the city from showing that the provisions of that act were not followed in issuing the bonds, as respects the bonds refunded, being city bonds, as well as in all other respects.

Vote of the People of the City and its Legal Effect.

The question was submitted pursuant to the Refunding Act of March 1, 1893, to a vote of the people of the city whether or not the indebtedness represented by the Water Company bonds, assumed by the city, as well as the other bonds of the city, should be refunded by the issue of the very bonds now here in question, and the people, at an election held on Tuesday, March 13, 1894, by a vote of 735 votes "for refunding the indebtedness" (including these Water Company bonds assumed by the city as fully set forth in the notice of election) and 22 votes against the same, voted in favor of refunding said bonds (Findings of Fact, Number 6, Record, p. 19 and Ordinance declaring result of Election, Record, p. 211).

The notice of election mentioned and described fully the $89,000 water company bonds by name, and people of the city, with this knowledge, voted to refund these bonds by the issue of the negotiable bonds now in question, containing the recital that they are issued "for the purpose of refunding the bonded indebtedness of said city," the form of new bonds being set forth in notice of election. The city and its voters should be held to the representations and recitals in these refunding bonds.

The notice of election distinctly informed the citizens and voters of the City of Santa Cruz that the city

council intended to refund the $89,000 bonds of the City Water Company, which had been assumed and agreed to be paid by the city. The said notice of election is as follows (Additional Finding of Fact No. 2, Record, p. 34):

"NOTICE OF SPECIAL ELECTION.

To the qualified electors of the city of Santa Cruz, and to all whom it may concern:

Notice is hereby given that a special election has been duly and regularly called, and will be held in and for the city of Santa Cruz, on Tuesday, the thirteenth day of March, 1894, at which there will be submitted to the qualified electors of said city the question of refunding the following bonded indebtedness of said city of Santa Cruz, issuing bonds therefor and providing for the payment of the same, viz:

* * * * * *

(2) Eighty-nine (89) first-mortgage bonds (with interest thereon from November 1, 1893), of the corporation, the City Water Company of Santa Cruz, heretofore issued by said corporation, the City Water Company, of Santa Cruz, which bonds bear date May 1, 1890, and are of the denomination of one thousand (1,000) dollars each, and bear interest at the rate of six (6) per cent. per annum, payable semi-annually, and are secured by a mortgage or deed of trust upon the property known as the city water works of Santa Cruz, executed by the City Water Company of Santa Cruz, as party of the first part therein, to the Holland Trust Company, of New York, as trustee, party of the second part therein, and which said bonds outstanding were, at the time of the conveyance by the City Water Company of Santa Cruz to the city of Santa Cruz of the property known as the city water works, and now are a valid lien and charge upon said property known as the city water works, and became thereby a part of the bonded indebtedness of the city of Santa Cruz;" etc.

Thus the people of the city of Santa Cruz were distinctly and specifically informed that these $89,000 water company bonds were to be refunded if the people so voted, and the people did so vote.

Furthermore, the people of the city of Santa Cruz were distinctly and specifically informed that these bonds were to be refunded by the issue of *negotiable* bonds, that is, bonds payable to bearer, and passing from hand to hand by delivery. The notice of election set forth the form of the refunding bonds (Record, p. 36). Still further, the said refunding bonds, the form of which was set forth in the notice of election, recited that they were issued

" for the purpose of refunding *the bonded indebtedness of said city* and issuing bonds therefor, and providing for the payment of the same, under and in pursuance of, and in conformity with, the provisions of an act of the legislature of the State of California, entitled ", etc. (giving the title of the refunding act approved March 1, 1893).

The voters of the city of Santa Cruz, by ~~735~~ 538 votes for and ~~22~~ 57 votes against, thus expressly and distinctly authorized the issue of these refunding bonds to refund the $89,000 water company bonds, and authorized the issue of such negotiable refunding bonds, payable to bearer, and containing the recital above quoted, that they were issued " for the purpose of refunding the bonded indebtedness of said city."

The question put to the qualified electors was distinctly whether the city should issue bonds of said city under the provisions of the said refunding act of the State of California, that is, issue *negotiable* bonds, which should pass from hand to hand by delivery and come, as these bonds have, into the hands of innocent holders for value. Afterwards, pursuant to, and expressly authorized by, such vote of the people, the city council issued the refunding bonds now in question. When it comes to a question which should suffer, if the act of voting and issuing the bonds was illegal, there

can be but one answer, either under strict law or moral justice: the city, and not the innocent holders of the bonds.

If the City ever intended to question or repudiate, or attempted to question or repudiate, these bonds of the water company which the city had assumed on the purchase of the water plant, that would have been the time for it to do so; but, instead of doing so, the people of the city, by their vote, with practical unanimity, agreed that this bond indebtedness should be paid as the bonds of the city, and that refunding bonds should be issued therefor.

Not only did the people of the city of Santa Cruz, by a vote of 735 votes for to 22 against, the issue of these refunding bonds expressly authorize their issue, but not one person in all the city of Santa Cruz made any effort to prevent as illegal the issue of bonds to refund the $89,000 water company bonds. This thing was not done in a corner. The proceedings for the issue of these bonds were all open and public, thoroughly advertised, and known to everybody in the city. No injunction proceedings to stop the issue of these refunding bonds were taken by any interested person. The city officers issued these refunding bonds, acting by this unanimous vote and sanction of the people of the city, and no hand was raised to stop them. The city and its officers thus authorized and issued these bonds, well knowing that they might come into the hands of innocent purchasers. Under these circumstances there can be but one answer to the question as to whether, under the law, as well as under moral justice, the innocent bondholder should suffer, or the citizens of the city of Santa Cruz should suffer, for the refunding of these $89,000 water company bonds, sup-

posing that such refunding was not authorized by the statutes of the state.

We may here pause to quote from the language of the late Chief Justice of this Court in the somewhat similar case of *Jasper County vs. Ballou*, 103 U. S., 745—language which is especially pertinent to the facts just stated. Mr. Chief-Justice WAITE, giving the unanimous opinion of the court, there said (p. 751):

"When, therefore, the people were called on to vote whether the old bonds should be funded, the facts they had to consider were these: A valid law authorizing the subscription and an issue of the bonds had been passed. The people, at an election which had been irregularly called, had voted to make the subscription and issue bonds bearing ten per cent. interest, and all payable within six years. An act had been passed to legalize the election, and under it the subscription which had been voted was made, and bonds such as were contemplated had been issued and were then outstanding in the hands of various parties. Whether these bonds were valid was, so far as any direct decisions were concerned, an open question, and certainly not free from doubt. Under these circumstances the question was directly put to the people of the county, in a manner authorized by law, whether they would recognize these bonds as 'binding and subsisting legal obligations,' and issue in lieu of them other bonds having twenty years to run and bearing seven per cent. interest instead of ten; and they, by their vote, said they would. There is no complaint of any illegality in this election, or of fraud or imposition. So far as the record shows, the proposition to fund went from the county authorities to the bondholders, and not from the bondholders to the county. The facts were as well known to one party as the other. If the people intended to rely on their defenses to the old bonds, then was their time for them to speak and by their vote say they would not recognize them as binding obligations. By voting the other way, they, in effect, accepted them as legal and subsisting for the purposes of the proposed extension of time at reduced interest, and said to the holders, if the proposition was accepted, no question of illegality

would be raised. Their offer having been accepted, they are now estopped from insisting upon an irregularity which they have by their votes voluntarily waived, with a full knowledge of the facts. The case is clearly, as we think, within the principle acted on by the Supreme Court of the State in *President and Trustees of the Town of Keithsburg vs. Frick, 34 Ill., 405.* **As was very properly said below by the learned circuit judge 'there must be an end of these contests and defenses some time or other.' There must be a time when the people in their political capacity are concluded by their contracts as much as individuals, and we think that where the people of a county, at an election held according to law, authorize their corporate or political representatives to treat certain outstanding county obligations as 'properly authorized by law' for the purpose of negotiating a settlement with the holders, and the settlement which was contemplated has been made, all contests as to the validity of the obligation must be considered as ended.**

"This disposes of all questions as to the excessive issue of bonds. For all the purposes of this case the original bonds must be taken as binding. The issue of the funding bonds did not increase the aggregate of the indebtedness of the corporation, but only changed its form."

So, also, the language of the Supreme Court in the case of *Graves vs. Saline County*, 161 U. S., 359, is likewise especially pertinent. Mr. Justice SHIRAS, giving the unanimous opinion of the Court, there says with regard to certain refunding bonds of Saline County (in that case refunding void bonds) (p. 374):

"But when, in pursuance of the funding laws, the question whether the outstanding original bonds issued to the Belleville and Eldorado Railroad Company should be refunded in new bonds was submitted to the same constituent body that authorized the original issue, and when, in accordance with the vote so taken, and in formal compliance with the other directions of

the funding laws, negotiable securities were issued and delivered in payment of the outstanding bonds, we know of no principle of law which forbids the county of Saline from such honorable discharge of its liabilities in the hands of innocent holders"

These decisions of the Supreme Court of the United States in the cases above referred to harmonize with the general doctrines and principles of the law as to negotiable paper and as to constructive notice.

Further as to doctrine of constructive notice generally.

No ordinance, notice of election or any "record" is constructive notice as to any negotiable paper unless a statute expressly so provides, and there is no such statute in California.

The proposition that the ordinance and notice of election are constructive notice to every holder of bonds as against the contrary specific and positive recitals in such bonds, and that they are constructive notice in the absence of any statute which so provides recital or no recital, seems to us to be an alarming and revolutionary principle in regard to negotiable instruments for the payment of money. The general principle, we take it, is well settled that, in order to render a thing constructive notice, some statute must so provide. This is the principle laid down by the Supreme Court in the case of *Burck vs. Taylor*, 152 U. S., 634, 654 :

"If notice was essential to charge them, actual notice should have been given, at least in the absence of any statute providing some means for constructive notice."

The principles and rules as to constructive notice have had an extensive application in regard to conveyances of real estate in this country. The statutes of most, if not all, of the States expressly provide for a public office, known as the registry of deeds, where conveyances of real estate may be recorded. Such office is provided with books and indexes and is open to the public at all times, and any person interested may go and examine such books ; and these statutes *in all cases* further expressly provide that the record of an instrument, duly executed and duly acknowledged, shall be constructive notice of such instrument to all subsequent purchasers of the real estate affected thereby. The opening of the public office and the recording of these deeds without such provision that the deeds so recorded shall be constructive notice would have no effect as giving constructive notice to any one. This is evident from the numerous decisions of the courts to the effect that where a deed is improperly recorded (as, for example, where it has been improperly acknowledged), the record of it in the public records is not constructive notice to a subsequent purchaser. Why? Because in the absence of a statute which expressly so provides such record is not constructive notice.

In 20 American and English Encyclopædia of Law, page 600, summarizing the established rule of law, it is said :

" If an instrument is either not authorized by law to be recorded, or is not authorized to be recorded by reason of its defective execution or the failure to comply with the prerequisites to recordation, its enrollment on the records is of no effect, and it cannot be said that it will charge with constructive notice."

In *McEwen vs. Den*, 24 How., 242, the Court said (p. 244) :

" The deed offered in evidence was recorded without legal proof of its execution, and, therefore, a copy of the record could not be evidence. The court erred in admitting the copy to go to the jury."

In *Olcott vs. Bynum*, 17 Wall., 44, the Court said (p. 59):

" The original deed from Hovey to Olcott and Stevenson never having been registered, *and the registration of the copy being unauthorized*, it follows that the certified copy of the registered copy was a nullity, and could give no legal right to the grantees which the Circuit Court could recognize."

In *Buel vs. Irwin*, 24 Mich., 145, the Court said:

" Apart from the curative act of 1861, this certificate was plainly insufficient to authorize the deed to be recorded. To entitle a deed to registry, its execution by the grantor must be proved or acknowledged, and when acknowledged the evidence of the acknowledgment of execution by the grantor must appear by the certificate, and if the acknowledgment is taken abroad, before a Michigan Commissioner, his certificate must be authenticated by his seal. In this case, the certificate does not show that the grantor acknowledged that *he* executed the deed, and, hence, if otherwise regular, the certificate would be bad, and the proof of execution of the deed, required by the statutes as a prerequisite to registry, would be wanting (*Haden vs. Westcott*, 11 Conn., 129)."

In *Ely vs. Wilcox*, 20 Wis., 523, the Court held that, for want of a certificate of a Clerk that the notary taking the acknowledgment was such, and that his signature was genuine, the deed was not authorized to be recorded, and was, therefore, not notice to any one. Other decisions are cited in a note to this case in 91 Amer. Dec., 436.

Mr. Wade says: " The requirements of the statute, both in regard to the official character of the acknowledging officer and the contents of his certificate, must be complied with in every substantial particular, or the

record of the instrument will be inoperative as constructive notice."

Wade on Notice, 2d Ed., Sec. 124.

In *St. John vs. Conger*, 40 Ill., 535, the Court said :

"It is insisted that the record of the copy of the deed from Madison County was sufficient to put subsequent purchasers upon inquiry. *To hold that parties ought to have been put upon inquiry by this record would be precisely the same thing as holding them affected with notice.* This would be giving to the record of an instrument, not entitled to be recorded, the same force as to notice that we give to one legally reduced to record. We do not think any authority can be found in support of this proposition. On the contrary, the familiar rule, and one laid down by this Court, is that the record of an instrument not entitled by law to be recorded is of no avail as notice *(Moore vs. Hunter*, 1 Gilm., 317*)*. It is said that a purchaser, as a matter of fact, receives the same information from the record of a copy as from the record of an original instrument. That may be true. But the broad difference is this : The statute only authorizes the record of original instruments, and it makes that record conclusive evidence of notice. It matters not that a subsequent purchaser has not, as a matter of fact, seen the record. If the instrument has been legally recorded, the law presumes him to have seen it, and holds him to the consequences of such knowledge. Not so as to the registry of a copy. It may be that if a party can be clearly proven to have read the record, he should be held to have derived from it the same degree of actual knowledge that he would have derived from seeing a copy of an instrument in the hands of a private individual. He might be considered as put upon inquiry. But the law does not presume him to have read the record of an instrument not authorized to be recorded. In the case before us there is no evidence that the defendant, and the intermediate parties through whom he claims from the heirs of McNemony, had actual knowledge of the record of the copy or had ever seen such record."

If such deeds *actually upon the registry* (but not entitled to be there) are not constructive notice to a per-

son who confessedly has constructive notice of whatever is required to be there, much less is the notice of election in the present case constructive notice to any one, for no one need examine the ordinance to see the notice of election, as the statute does not require the ordinance to set forth the notice of election.

It is true that ordinarily the purchaser of a piece of *real estate* must take notice of any judgment and litigation in the courts of general jurisdiction affecting the title of such real estate. But real estate is property *not negotiable according to the law merchant*, and an entirely different rule prevails with regard to judgments or litigation affecting negotiable instruments.

As to Constructive Notice in Case of Negotiable Paper.

How free negotiable paper is from any "*constructive* notice" is seen from the following, to wit:

The purchaser of negotiable paper is not bound to take notice (that is, does not have constructive notice) of any litigation pending, or any judgments which may have been previously rendered regarding such negotiable paper.

This principle has been repeatedly decided by this court.

That a pending suit, or a judgment in any suit regarding negotiable bonds, is not constructive notice to a *bona fide* purchaser thereof was well settled by this court upon great consideration in the case of *County*

of Warren vs. Marcy, 97 U. S., 96. This court states as follows the question there presented (p. 105).

"This brings us to the second question; namely, whether the pendency of the chancery suit for vacating the proceedings of the supervisors, and preventing the issue of the bonds in this case, was in itself constructive notice to all persons of their invalidity, or of the objections raised against them. This question has an important bearing upon the case, for, whilst the bonds may be valid in the hands of a *bona fide* purchaser before maturity, and without notice of any defect or vice in their origin, this cannot be said in reference to one who has such notice, or who is chargeable therewith."

The court, after full consideration of the matter and review of the numerous authorities, answered that question in the negative.

So. also, this court in the case of *Carroll County vs. Smith*, 111 U. S., 556, said (p. 562):

"The defendant in error was no party to that suit, and the record of the judgment is therefore no estoppel. The bonds were negotiable, and there was, therefore, no constructive notice of any fraud or illegality by virtue of the doctrine of *lis pendens (County of Warren vs. Marcy*, 97 U. S., 96*)*."

See also to the same effect:

Orleans vs. Platt, 99 U. S., 676.
Cass County vs. Gillett, 100 U. S., 585.
Thompson vs. Perrine, 103 U. S., 806.
1 Dillon *Munic. Corp.*, 4th Ed., Sec. 514, and cases cited in State as well as Federal courts.

Actual Bad Faith on Bondholder's Part Must Exist in Order to Affect Him With Constructive Notice.

There is also another principle which is especially pertinent to the present case.

Where it is sought to affect the bona fide purchaser of negotiable paper with constructive notice, the question is not whether there were grounds of suspicion, or even gross negligence on his part, but the question is whether he has acted in bad faith.

In *Murray vs. Lardner*, 2 Wall., 110, Murray had loaned money on some coupon bonds payable to bearer, to a person whom he did not know, and under circumstances which might, perhaps, have excited suspicion as to the title of such person to the bonds. The Court, in its charge, submitted to the jury (p. 113) :

" Whether there were such circumstances of the character which I have described to you as would warrant the inference that there was ground of suspicion, and that he should have made further inquiry as to the character of the paper."

The Supreme Court of the United States held that this was error, and reversed the judgment. The Court (Mr. Justice SWAYNE delivering the opinion) in reviewing the English cases and preceding cases in this Court, says (p. 121) :

" In *Goodman vs. Simonds*, 20 Howard, 343, the subject was elaborately and exhaustively examined both upon principle and authority. That case affirms the following propositions :

" The possession of such paper carries the title with it to the holder : ' The possession and title are one and inseparable.'

"The party who takes it before due for a valuable consideration, without knowledge of any defect of title, and in good faith, holds it by a title valid against all the world.

"Suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, will not defeat his title. *That result can be produced only by bad faith on his part.*

"The burden of proof lies on the person who assails the right claimed by the party in possession.

"Such is the settled law of this court, and we feel no disposition to depart from it."

So, also, in *Swift vs. Smith*, 102 U. S., 442, this court (Mr. Justice STRONG giving the opinion) says, regarding the purchase of a negotiable note (p. 444):

"There is nothing in the case to show that Smith's purchase was not in good faith. There was nothing upon the note, nor anything in the endorsement thereon, to notify him that it did not belong to Jackson, both legally and equitably. It was mercantile paper, and not due. One who purchases such paper from another, who is apparently the owner, giving a consideration for it, obtains a good title, though he may know facts and circumstances that cause him to suspect, or would cause one of ordinary prudence to suspect, that the person from whom he obtained it had no interest in it, or authority to use it for his own benefit, and though by ordinary diligence he could have ascertained those facts. *Goodman v. Simonds*, 20 How. 343.) *He can lose his right only by* ACTUAL NOTICE OR BAD FAITH."

See, also, to the same effect, *Goetz v. Bank of Kansas City*, 119 U. S., 551, 560.

Even as respects non-negotiable property, like real estate, this court in *Wilson v. Wall*, 6 Wall., 83, treating of constructive notice, quotes with approval (p. 91) *Sugden on Vendors*, as follows:

"In *Ware v. Lord Egmont* the Lord Chancellor Cranworth expressed his entire concurrence in what, on

many occasions of late years, had fallen from judges of great eminence on the subject of constructive notice, namely, that it was highly inexpedient for courts of equity to extend the doctrine. When a person has not actual notice he ought not to be treated as if he had notice unless the circumstances are such as enable the court to say, not only that he *might have acquired*, but also that he ought to have acquired it but for his gross negligence in the conduct of the business in question. The question then, when it is sought to effect a purchaser with constructive notice, is not whether he had the means of obtaining and might by prudent caution have obtained the knowledge in question, but whether not obtaining was an act of gross or culpable negligence."

Applying these principles to the present case, it is perfectly obvious that a person purchasing one of the bonds now in question, with its specific and positive recitals that these bonds are "issued by the said city of Santa Cruz for the purpose of refunding *the bonded indebtedness of said city*," is not guilty of "*bad faith*," "gross or culpable negligence," or of any negligence whatever, in not looking up all the records of said city before purchasing the bonds, or in believing and relying on the express recital made by the city in the bonds that what was refunded was "*the bonded indebtedness of said city.*"

Even if it were to be assumed and held that a purchaser of negotiable bonds without any recitals would have constructive notice of the ordinances, resolutions and notices of election and would be bound at his peril to examine the same before purchasing the bonds (and if this were held to be so in the absence of any statute which provides that such ordinances, resolutions, and notices of election shall be constructive

notice—a holding which we believe to be clearly erroneous), yet recitals in bonds constitute an estoppel, precisely on the same principle that an estoppel may and frequently does exist in respect to the title of real estate.

The statutes of most of the States provide for records of deeds and mortgages and other instruments of conveyance of land, and that such records shall be constructive notice to all subsequent purchasers. Nevertheless, the courts uniformly hold that a person may estop himself from relying upon the constructive notice which such records furnish.

This was held in a case in New York in regard to a municipal corporation. *Trustees, &c., of Town of Brookhaven vs. Smith*, 118 N. Y., 6. There the town had passed certain resolutions recognizing the title of the land in Smith, whereas the records showed that the title was not in Smith, and the Court of Appeals held that the town was estopped to assert or rely upon the record title. The court says (p. 641):

"The authorities in this state are all harmonious on the subject of estoppel *in pais*.

"When a party, either by his declarations or conduct, has induced a third person to act in a particular manner, he will not afterwards be permitted to deny the truth of the admission if the consequence would be to work an injury to such third person or to some one claiming under him (*Wendell vs. Van Rensselaer*, 1 Johns. Ch., 344, 354; *Storrs vs. Barker*, 6 *id.*, 166; *Town vs. Needham*, 3 Paige, 545; *Dezell vs. Odell*, 3 Hill, 215; also see dissenting opinion of Judge BRONSON approved in 47 N. Y., 500; *Brown vs. Sprague*, 5 Denio, 545; *Plumb vs. Cattaraugus C. M. Ins. Co.*, 18 N. Y., 393; *Welland Canal Co. vs. Hathaway*, 8 Wend., 483; *Thompson vs. Blanchard*, 4 N. Y., 303; *Com'l Nat. Bk. vs. Nat. Bk. Commonwealth*, 50 *id.*, 575;

Armour vs. M. C. R. R. Co., 65 *id.*, 111–122; *N. Y Rubber Co. vs. Rothery*, 107 *id.*, 310–316).

"Numerous cases where this principle has been applied to real estate are collected in Washburn on Real Property (vol. 3, chap. 2, sec. 6), to which reference is made. When so applied it is as effectual as a deed would be from the party estopped.

"The general rule deduced from all the authorities is that if one is induced to purchase land by the acts or representations of another designed to influence his conduct, and creating a reasonable belief on his part under which he acts that he is thereby acquiring a valid title to the same, the party who thus influenced him is estopped from setting up his own title, existing at the time of the purchase, against that of the purchaser.

"The various declarations of the town through the trustees and town meetings must be construed as a single representation. They were all *in pari materia*, and had one purpose—viz., to inform Smith that the town made no claim to the land he desired to purchase."

To hold that the ordinances, resolutions and notices of election can be introduced as evidence to overthrow the estoppel produced by the recitals in the bonds is for the City to invoke and use the doctrine of constructive notice to perpetrate a fraud. But Courts never permit this doctrine to be invoked for any such purpose.

This is a principle that will forever stand in the way of any person, whether natural or artificial, retracting such representations as those made in these bonds. The question of fact as to whether the indebtedness which was being renewed by these refunding bonds *were valid bonds of the City was one peculiarly within the knowledge of defendant*. The purchaser of the bonds had no actual knowledge on the subject. He trusted to and relied upon these representations. The doctrine of the *Sutliff case*, as applied to any recitals in

those bonds is one thing (even if that case really has any great importance after the decisions in *Evansville vs. Dennett* and *Gunnison County vs. Rollins*, *supra*), but the application of it to overthrow the recitals in these bonds would be another matter. What were these recitals made for?

The City officers knew that these bonds would go on the market and would pass from hand to hand for value. They knew that these representations would give currency to the bonds. They knew they would reach the hands of men who would place their money in them as an investment. Now, to allow defendant to allege the falsity of these representations would be to allow it to perpetrate a frand—an *actual, willful and monstrous fraud*. This has never before been tolerated by a Court of justice. The doctrine of constructive notice can never be invoked as an aid to the perpetration of a willful fraud. It is a doctrine used to balance and adjust equities where no fraud is intended. Suppose a man has a deed on record, but, for the purpose of defrauding a third party, tells him that his grantor has a perfect title, and induces him to buy the property. Will the doctrine of constructive notice aid in the fulfillment of the fraud? Certainly not. But where is there any difference, in principle, between the case supposed and the case at bar? These representations were with reference to definite, specific facts. There is no pretense that a *mistake* was made. They were calculated to *deceive*. A man is presumed to intend the natural results of his acts. They were of such a character that if—as is now claimed—they were absolutely false, they must be pronounced wilfully

fraudulent. Let us see what the Courts have said upon this subject.

In *Converse vs. Blumrich*, 14 Mich., 109, the Court said:

"The laws of constructive notice can never be so applied as to relieve a party from responsibility for *actual misstatements and frauds.*"

In *Groton Savings Bank vs. Batty*, 30 N. J. Eq., 126, the Court said:

"The principle [that the possession of land is notice to others of the possessor's title] which the Lathrops invoke is intended for a shield to protect the equitable rights of those who are entitled to the consideration of equity. It will not be available as a *cover of fraud*, nor will it be applied against equity."

In *Wild vs. Gibson*, 1 H. L. Cas., 605, the Court said:

"Constructive notice is resorted to from the necessity of finding a ground of preference between equities otherwise equal, but cannot be applied in support of a charge of *direct personal fraud.*"

See, also, *Gill vs. Hardin*, 48 Ark., 412.

In *Stone vs. Covell*, 29 Mich., 359, the Court said:

"We have heretofore held that a man is bound by his positive and unequivocal assertions of fact, and bound to make good the consequences of their falsehood. And when he asserts as true what he has reason to believe false, and gives no qualification to show that he is not speaking positively and from knowledge, we think there is no sense or justice in exempting him from responsibility *(Converse vs. Blumrich*, 14 Mich., 109; *Beebe vs. Knapp*, 28 Mich., 53; *Beatty vs. Lord Ebury*, L. R., 7 H. L., 102*)*."

The principle of constructive notice is always resorted to in order to prevent the person having it from doing an act to the injury of another, and does not apply where the question is whether one was barred by

his assent to a *fraud practiced on him (Spencer vs. Spencer*, 3 Jones Eq., 404*)*.

The defendant in this case is pleading its *own fraud*. It is asking to be permitted to show that its positive statements of facts *were false*—not false by mistake, but *wilfully and solemnly false*. It does this upon the flimsy pretext that it had made another record, at another time, from which, if the purchaser of these bonds had examined it, he would have ascertained that this latter statement was false. Even if this conclusion, as to what the other record would show, were correct, we deny that the fraud can be evaded in that way. This other record could only give constructive notice, and that is inadequate to repel a positive fraud.

Back of these recitals was an order entered of record prescribing what the bond should recite (Record, p. 32, 36). Suppose there was some conflict between these records. Which was a purchaser entitled to believe? The recital was the later record. It was *specific and certain* as to the bonds being issued to refund "bonded indebtedness of said city." It related to a matter not only peculiarly within the knowledge of defendant, but one that it was its *duty* to investigate.

As to this question of fraud, it will not do to try to make a scapegoat of the City Counsel and plead the innocence of the people of this city. The people voted these bonds under a notice of election, specifying and describing the bonded indebtedness to be refunded. The procedure of the council was all entered of record. The whole transaction was open and public. During the period that these bonds, containing these recitals, were being issued, no taxpayer came forward and objected to their issuance or to the recitals they contained.

Public Policy Requires that the Negotiable Character of Municipal Bonds be Fully Maintained, and that the Defense Attempted in the Present Case Should be Held Bad.

The character of municipal bonds as negotiable securities has been well settled by scores of decisions in the Courts. As such negotiable securities, easily marketable, passing from hand to hand, they constitute a desirable and convenient investment for money. The importance of preserving to its fullest extent the negotiable character and standing of such securities is fully as great to the municipalities themselves as to the purchasers of such securities. It is their negotiability that is the chief element of their desirability as an investment, and that has resulted in the reduction of the interest on these securities to the present low rates. But once let it be understood among the investing community, who constitute the market for these municipal bonds, that such securities are not negotiable, but that a purchaser of them—it may be in the City of New York, or Boston, or Philadelphia, or Washington, or Chicago—must himself take a journey to Santa Cruz, California, and search out records that existed five, ten, twenty or even thirty years before his contemplated purchase of bonds, and inform himself in regard to all those records before he completes his purchase—we say once let this be understood, and the market for municipal securities is gone. We do not believe that this Court will give its assent to any such doctrine, or that it is going to hold that a notice of election or an ordinance of the city is constructive notice to all the world, affecting the city's negotiable

bonds, into whosesoever hands they may come, and also can be used as a defense against bonds in the face of the specific and solemn recitals therein contained. Such is not the doctrine of this Court. On the contrary, this Court has expressly stated and held in *Evansville vs. Dennett*, 161 U. S., 434, *supra* (p. 443):

"As therefore the recitals in the bonds import compliance with the city's charter, purchasers for value having no notice of the non-performance of the conditions precedent, were not bound to go behind the statute conferring the power to subscribe, and to ascertain, by an examination of the ordinances and records of the City Counsel, whether those conditions had, in fact, been performed. **With such recitals before them they had the right to assume that the circumstances existed which authorized the city to exercise the authority given by the Legislature.**"

So also, in *Marcy vs. Oswego Township*, 92 U. S., 637 (the leading case in respect of the effect of an *over-issue* of bonds where the limit is fixed by statute), the recital was as follows (p. 639):

"This bond is executed and issued by virtue of and in accordance with an act of the Legislature of said State of Kansas, entitled 'An act to enable municipal townships to subscribe for stock in any railroad, and to provide for the payment of the same, approved Feb. 25, 1870,' and in pursuance of and in accordance with the vote of three-fifths of the legal voters of said Township of Oswego, at a special election duly held on the seventeenth day of May, A. D. 1870."

The Court says that the bonds are valid:

"Unless they were voted and issued in excess of the amount authorized by the act. It became, therefore, a question whether in this suit, brought by a *bona fide* holder for value to recover the amount of some of the coupons, it could be shown, as a defence to a recovery, that at the time of voting and issuing the series of

bonds the value of the taxable property of the township was not in amount sufficient to authorize the voting and issuing the whole series, amounting to $100,000."

The Court held that such defense could not be made; and, on this point said (p. 641):

"So, also **the subsequent issue of the bonds containing the recital above quoted,** that they were issued 'by virtue of and in accordance with' the legislative act, and 'in pursuance of and in accordance with the vote of three-fifths of the legal voters of the township,' **was another determination not only of the result of the popular vote, but that all the facts existed which the statute required, in order to justify the issue of the bonds."**

Conclusion Under This Point.

In conclusion, under this Point, we respectfully submit to this court that the views which are stated by the Circuit Court of Appeals as the ground, and the *only* ground for its decision in the present case, namely, that the *bona fide* holder of a negotiable municipal bond, payable to bearer and transferable by delivery, is put upon notice of what is contained in the books of record of proceedings of the municipality issuing the bonds, would overturn the whole doctrine of negotiable municipal bonds. They would no longer be negotiable according to the law merchant; that is, transferable by delivery, and be protected in the hands of the purchaser against any equities and defenses not appearing upon their face, but they would, in substance and effect, be reduced to the quality of instruments non-negotiable according to the law merchant. Any such doctrine is, as we have shown in

this brief, directly contrary to the numerous decisions of this court, and especially to the decisions in the cases of *Hackett vs. Ottawa*, *Evansville vs. Dennett*, *Gunnison County vs. Rollins*, and the other cases referred to *(supra)*.

These bonds, as appears by the record in this case, had been voted for by the electors, issued by the city, executed and delivered by the city, and had passed into the hands of about a score of purchasers for value—savings banks, national banks, trust companies and other purchasers, and investors and lenders on negotiable paper—in the regular course of business. The decision of the Circuit Court of Appeals in the present case is to the effect that all these numerous holders of these bonds and coupons must lose their money because they did not each one, before lending any money on these negotiable bonds containing the recital that they were issued to refund bonded indebtedness of the city of Santa Cruz, make a journey across the continent and examine for themselves the records and books of the city of Santa Cruz—for what? For the purpose of finding evidence to contradict the express recital in the bonds that they are issued to "*refund the bonded indebtedness of said city.*" The impracticability, not to say anything of the gross injustice of any such doctrine, is obvious. It is not the doctrine of this court, and the decision of the Circuit Court of Appeals should be reversed.

II.

Inasmuch as the bonds in question have passed into the hands of bona fide holders for value, the fact that such bonds are negotiable and the general principles of law applicable to negotiable bonds prevent the city of Santa Cruz from setting up as a defense either (a) that the said bonds were issued in part for refunding water company bonds, which water company bonds had been assumed and agreed to be paid by the city, or (b) that it delivered the bonds on a sale upon credit, and without receiving cash payment therefor, or upon a sale not made in a manner prescribed by law. It is too late to raise any such defense after negotiable bonds have passed into the hands of bona fide purchasers.

That the *mere negotiability of the bonds* would cut off the defense that they were issued in part to refund the bonds of the water company, see *State of California vs. Wells, Fargo & Company*, 15 Cal., 336 (1860), quoted in this Brief, p. 68.

Purchaser of negotiable bonds in the market is not bound to inquire whether the maker received payment or other consideration therefor when the bonds were issued.

A person purchasing a negotiable municipal bond in the regular course of business, say from a dealer in

bonds in New York, or Chicago, or Boston, does not ask, nor is he required by law to ask, the vendor of the bond to wait, before the purchase is concluded, until the proposed purchaser can communicate with the maker of the bond and ascertain from the maker whether or not the maker received pay for the bond when it was issued, or until the proposed purchaser can himself take a journey, or send some representative of his on a journey, to the place where the bond was issued, and look up the records and make an investigation to ascertain whether or not the bond was paid for when it was issued. Such is not the actual practice as to the purchase of negotiable bonds or other negotiable instruments; nor does the law require any such procedure and inquiry by the proposed purchaser of a negotiable bond. On the contrary, the law is well settled, and this is a fundamental part of the law of negotiable paper, that when such paper has passed into the hands of a *bona fide* purchaser it is too late to raise any question that the maker thereof did not receive a consideration for its issuance.

The bonds in question in the present case were executed and delivered by the city. This is expressly found by the Court (Finding of Fact No. 11, Record, p. 23). The learned counsel for the city, however, claims that some of the conditions on which the statute authorizes such delivery were not complied with; such as a sale at not less than face value in gold coin and payment of the purchase price. If these conditions were not complied with, that fact does not negative a delivery of the bonds, and does not constitute any defense to the bonds. The delivery of the bonds was one distinct act, and the sale at par in gold and payment therefor, while required to be precedent or simultaneous acts,

were only conditions precedent, and, whether performed or not, did not change the fact of delivery.

It is well settled that municipal bonds payable to bearer and the coupons thereof, such as are the bonds and coupons in the present case, are negotiable instruments; that is, negotiable according to the law merchant. It is, of course, not necessary to cite to this Court the numerous decisions of the Supreme Court of the United States to this effect. This negotiability means something. It means that an instrument of this kind for the payment of money, payable to bearer, is intended to pass by delivery from hand to hand, and to give a good title thereto to the person who pays his money therefor without any notice of any illegality in respect thereof. The further effect of such negotiability is to cut off the maker from setting up any defense to such instruments, except that he did not make the instruments (in other words, what was known at common law as the plea of *non est factum*), and as respects municipal corporations this includes everything except the question whether there was power given in the Constitution or statute to issue such bonds. As respects such negotiable instruments, the maker thereof, whether the maker be a municipal corporation or an individual, cannot set up any defense such as that it or he did not receive payment for the bonds, or that the bonds were in fact issued for an unauthorized purpose, or that the proceeds of the said bonds were in fact appropriated in whole or in part to an unlawful purpose. When there is power given by statute to issue such negotiable instrument, and such instrument has been issued, and has passed into the hands of a *bona fide* holder for value, it is too late to set up any such defense. This results from the mere negotia-

bility of the bonds under the law merchant, as has been decided in numerous cases in the Supreme Court of the United States and in other courts.

The principles which apply as to negotiable instruments, where such instruments have come into the hands of *bona fide* holders, are well stated by Chief Justice BIGELOW in the case of *Fearing vs. Clark*, 16 Gray (Mass.), 74 (approved by the U. S. Supreme Court in the case in 170 U. S., 593, 604, next cited in this brief), where the court says :

"The defendant proved no facts at the trial which constituted a valid defense to the note declared on as against the plaintiff, who is a *bona fide* holder for value, without notice. The rule is well settled that, when a note is transferred by a party to whom it is entrusted without authority, or fraudulently, it will be valid as against the maker in the hands of a holder who takes it *bona fide* without notice of the special circumstances under which the note came into the possession of the payee or agent of the maker who puts it in circulation. In such case the maker or endorser who places it in the hands of another for the purpose of being used in a particular way or for a special object takes the risk of its being used in a different way, and cannot refuse to pay it to any *bona fide* holder into whose hands it may come (Chit. Bills (10th ed.), 198; *Sweetser vs. French*, 2 Cush., 309). It is undoubtedly true that, as between the original parties to a note, or those who take it with notice, it is essential that there should have been a delivery of the note by the maker to take effect as a contract. In this sense delivery is included in the allegation of making. But the rule is qualified and limited as between the maker and a *bona fide* holder. In such case a valid delivery can be made by any person to whom the maker has given the note in such form as to enable him to hold himself out as absolute owner of the note. The case of *Putnam vs. Sullivan*, 4 Mass., 45, is a strong one on this point. There the notes were delivered to a clerk to be used for special purposes only, and it was held that a delivery by the clerk, whether through deception practiced on him or by a voluntary violation of the trust reposed in him, must be deemed

in law, as against a *bona fide* holder, a delivery by those who were liable on the notes. The rule is different in regard to a deed, bond or other instrument placed into the hands of a third person as an escrow, to be delivered on the happenings of a future event or contingency. In that case no title or interest passes until a delivery is made in pursuance of the terms and conditions upon which it was placed in the hands of the party to whom it was intrusted. But the law aims to secure the free and unrestrained circulation of negotiable paper, and to protect the rights of persons taking it *bona fide* without notice. It therefore makes the consequences which follow from the negotiation of promissory notes and bills of exchange through the fraud, deception or mistake of those persons to whom they are intrusted by the makers, to fall on those who enabled them to hold themselves out as owners of the paper *jure disponendi*, and not on innocent holders who have taken it for value, without notice."

Another case in point is *Provident Life & Trust Company vs. Mercer County, 170 U. S.*, 593.* The facts in that case were that the County of Mercer, Kentucky, had subscribed for stock and voted bonds in aid of the construction of the Louisville Southern Railroad. The statute which authorized the issue of the bonds provided (p. 594):

SEC. 4. The said bonds shall not be binding and valid obligations until the railway of the said company shall have been so completed through such county that a train of cars shall have passed over the same, at which time they shall be delivered to said railroad company in payment of the subscription of such county, and the county shall thereupon be entitled to receive certificates for the stock subscribed, and the county judge of such county shall order that such bonds *shall be deposited with a trustee or trust company,*

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*This decision reversed *Mercer County vs. Provident, &c., Trust Co.*, 43 U. S. App. 21, which last mentioned decision was cited as authority by the learned counsel for the city of Santa Cruz in their brief in the present case in the United States Circuit Court of Appeals.

to be held in escrow, and delivered to the said railroad company when it shall become entitled to the same by the construction of its road through such county: Provided, however, that such trust company or trustee shall, before receiving such bonds, give bond with good surety, approved by the county judge, for the faithful performance of his or its duty in the premises: *And provided, further,* that no such subscription shall be binding unless such railroad shall pass to or through the corporate limits of the town of Harrodsburg."

The bonds in question in that case were deposited with a trustee, as provided by said section 4. Afterwards the said trustee delivered the bonds to the railroad company. The county made default in the payment of the interest on the bonds. The Provident Life and Trust Company, a *bona fide* purchaser of certain of said bonds, brought an action for interest thereon. The defense set up by the county was that the bonds had been delivered by the trustee contrary to the terms of section 4 of the statute above quoted, in that the railroad company had not constructed its road so as to entitle it to the delivery of the bonds at the time such delivery was made by the trustee. This defense was held good by the United States Circuit Court of Appeals for the Sixth Circuit, but the Supreme Court of the United States reversed this judgment. Mr. Justice BREWER, giving the opinion of the Supreme Court, says (p. 604):

"But if the true, the only permissible, construction be otherwise, and the demand of the statute is that the road be actually constructed from the north to the south line of the county, and so constructed that a train of cars shall have passed over it, then the question arises as to the effect of the decision of the trustee that the condition had been complied with, and of his delivery of the bonds, and their subsequent purchase by a *bona fide* holder. It is said that the bonds were placed in escrow, and that when an instrument is so

placed there can be no valid delivery until the condition of the escrow has been performed, and without performance the instrument passes out of the hands of the one holding it in escrow it is not enforcible against the maker, and that in a suit on the instrument the inquiry is always open whether the condition of the escrow has been performed. Whatever may be the rule in case the instrument so placed in escrow be a deed or non-negotiable contract, we are of opinion that a different rule obtains when the instrument is a negotiable obligation.

" 'It is generally agreed that a delivery of negotiable paper left in escrow, contrary to the terms upon which it was to have been delivered, will pass a good title to the *bona-fide* transferee for value and before maturity.'

" *Long Island Loan and Trust Co. v. Columbus etc. Railway*, 65 Fed. Rep., 455, 458.

" In *Fearing v. Clark*, 16 Gray, 74, 76, Chief Justice BIGELOW thus states the law :

" 'The rule is different in regard to a deed, bond or other instrument placed in the hands of a third person as an escrow, to be delivered on the happening of a future event or contingency. In that case, no title or interest passes until a delivery is made in pursuance of the terms and conditions upon which it was placed in the hands of the party to whom it was intrusted. But the law aims to secure the free and unrestrained circulation of negotiable paper, and to protect the rights of persons taking it *bona fide* without notice. It therefore makes the consequences which follow from the negotiation of promissory notes and bills of exchange through the fraud, deception or mistake of those persons to whom they are entrusted by the makers, to fall on those who enable them to hold themselves out as owners of the paper *jure disponendi*, and not on the innocent holders who have taken it for value without notice.'

" In *Burson v. Huntington*, 21 Michigan, 415, 433, it is said :

" ' If the maker or indorser, before delivery to the payee, leave the note in the hands of a third person as an escrow, to be delivered upon certain conditions only, * * * and the person to whom it is thus intrusted violate the confidence reposed in him ; and put the note into circulation ; this, though not a valid delivery as to the original parties, must, as between a

bona fide holder for value, and the maker or indorser, be treated as a delivery, rendering the note or indorsement valid in the hands of such *bona fide* holder.'

"See also *Vallett v. Parker*, 6 Wend. 615, 620; *Chase National Bank v. Faurot*, 149 N. Y. 532; *Graff v. Logue*, 61 Iowa, 704.

"Within these authorities it must be held that when the trustee adjudged that the condition had been complied with and delivered the bonds the railroad company took such a title as transferred to a *bona fide* holder, enabled him to recover against the county, notwithstanding the condition had in fact not been performed. That the trustee was the agent of the county and responsible to it for the manner in which he discharged this duty is obvious from the provision in the statute that he shall give 'bond, with good surety, approved by the county judge, for the faithful performance' of his duty. If, in case the condition was not performed, the county had a perfect defense to the bonds, even in the hands of a *bona fide* holder, there were little need of requiring the trustee to give any security."

It was objected in the case of *Provident Life & Trust Company vs. Mercer County*, 170 U. S., 593, just as it was objected by the learned counsel for the City of Santa Cruz, in the present case in the Circuit Court of Appeals, that recitals in bonds cannot operate as to a fact occurring after the signing of the bonds and before delivery, the learned counsel citing therefor the reversed decision of *Mercer County vs. Provident Trust Company*, 43 U. S., App., 21. In the Supreme Court of the United States, in *Provident Life & Trust Company vs. Mercer County*, 170 U. S., 593, Mr. Justice BREWER, giving the opinion of the Court, says (p. 601):

"But it is said that the recitals in this case can be be held conclusive only as to matters transpiring before the placing of the bonds in the hands of the trustee, such as the election, etc., because by section 4 of the statute the bonds, when executed, were to be de-

posited with a trustee, to be held in escrow and delivered only upon the performance of a certain condition—a condition to be performed subsequently to the execution of the bonds. Assuming, without deciding, that such limitation must be placed upon the recitals, we pass to inquire whether that condition was in fact performed, and, if not, whether after delivery by the trustee the county can be permitted to raise the question as against *bona fide* holders."

The Court then held, as above stated, that the mere fact that bonds were negotiable, without any reference to the recitals in the bonds, was sufficient to prevent the county from raising any defense, as against *bona fide* holders, that the bonds had been delivered without compliance with the provisions of the statute as to conditions upon which delivery was to be made.

If it were necessary, an argument might well be made to the effect that the recitals in the bonds, such as the recitals in the bonds in the present case (Record, p. 5), to wit:

That this bond is

"issued * * * under and in pursuance of and in conformity with, the provisions of an act of the legislature of the State of California," &c.

"And it is hereby certified and declared that all acts, conditions, and things required by law to be done precedent to and in the issue of said bonds, have been properly done, happened, and performed in legal and due form, as required by law."

would estop the defendant from showing that when the bonds were delivered the provisions of the statute had not been complied with as to sale. This question as to the effect of recitals was not decided by this Court in the case of *Provident Life & Trust Company vs. Mercer County*, because it was not necessary to decide it, the mere negotiability of the bonds,

on general principles, being enough to prevent the defendant raising any such defense. But obviously this recital was put into the bond to take effect as a part of the bond when it should pass into the hands of purchasers and holders thereof. There is no reason in principle why such a recital might not be prepared beforehand and inserted in the bond to take effect as a recital when the bond is delivered, and to cover all matters down to and including the time of the delivery of the bond. This is done every day in deeds, and there is no reason why the same thing may not be done as respects a bond. The mere fact that the bond is actually prepared and signed before it is delivered need not prevent the municipality from preparing and inserting in the bond recitals which are intended to be good, and will be good, *as of the time when the bond is delivered.*

But however this argument as to recitals may be regarded, it is, as stated by the Supreme Court in *Provident Life & Trust Company vs. Mercer County*, 170 U. S., 593, 601, not at all necessary to consider such recitals, but the mere fact that the bonds are negotiable is enough to prevent any such defense as that the bonds were not sold in accordance with the provisions contained in the statute authorizing them.

In *Mercer County vs. Hacket*, 1 Wall., 83, the statute provided that the bonds should not be sold (p. 83) "at less than the par value thereof." On the trial, the county proposed to prove (p. 85)

"'that the bonds issued were paid out by the railroad company to contractors at about sixty-six and two-third cents on the dollar; all this for the purpose of showing that the bonds were procured from the County of Mercer by misrepresentation and fraud, and were not binding upon her, and, after being thus

obtained, were disposed of at less than their par value, *in violation of the provisions of the act authorizing the county to subscribe and issue bonds;* and also for the purpose of showing want and failure of consideration.

"The court below refused to let such evidence be given," &c.

The Supreme Court affirmed the judgment, saying (p. 96):

"In the case of *Woods vs. Lawrence County*, 1 Black, 386, as a corollary from the principles stated, we have decided that, in a suit brought on the coupons of these bonds by a *bona fide* holder, his right to recover is not affected by the fact that the railroad company sold the bonds at a discount, contrary to the provisions of their charter, which forbids the sale of them at less than their par value."

III.

The Circuit Court and the Circuit Court of Appeals erred in holding that ordinances numbered 314 and 315 showed or gave notice on their face that the $89,000 bonds issued by the Water Company were not part of the bonded indebtedness of the City of Santa Cruz. The city of Santa Cruz had purchased the plant of the water company subject to the mortgage securing the said bonds, and also assuming and agreeing to pay the said bonds, and therefore the city of Santa Cruz had these bonds as "an outstanding indebtedness evidenced by bonds" within the meaning of the act of March 1, 1893 (Stat. 1893, p. 59, quoted

ante pp. 3–5), authorizing the issue of refunding bonds.

History of Acquisition of Water Works Plant by City.

The facts as to the water-works property in Santa Cruz appear in the findings and record. The court finds (Record, p. 26) that Ordinance Number 314 was passed, which recites, among other things, that $89,000 first mortgage bonds of the water company, secured by mortgage, were outstanding, and concludes thus (Record, p. 26):

"which said bonds outstanding were, at the time of the conveyance by the City Water Company, of Santa Cruz, to the city of Santa Cruz, of the property known as the city water works, and now are, a valid lien and charge upon the said property known as the city water works, and became thereby *a part of the bonded indebtedness of the city of Santa Cruz.*"

The conveyance thus referred to is set out at length in the Bill of Exceptions (Record, pp. 176–185), which conveyance is dated March 29, 1892, and was duly recorded. This conveyance recites (Record, pp. 176, 177) that on the 16th of September, 1889, the city of Santa Cruz entered into a contract with Coffin & Stanton, which contract is set out in the said conveyance *in extenso*. Said contract recites, among other things (Record, p. 177), that

"WHEREAS, the city of Santa Cruz desires to acquire a water-works system for said city;
AND, WHEREAS, Coffin & Stanton desire to furnish such a water-works system;" etc.

Said contract then proceeds to grant to Coffin & Stanton a franchise to construct a water-works system

in conformity with the specifications of the city engineer, embodied in his report of July 30, 1889. Said contract also provides that Coffin & Stanton shall organize a water company and assign said c ntract and franchise to such company. Said contract then contains this covenant (p. 177):

"And said city of Santa Cruz agrees to purchase said water works when the same are completed, and to pay for the same the sum of three hundred and twenty thousand dollars, as hereinafter set forth."

The contract then stipulates that the water company may make a mortgage on its plant, and contains a provision for the application of any payments which the city shall make to the extinguishment and cancellation of the mortgage bonds. Then follows this covenant (p. 178):

"And when said water company shall have fully completed said water works, then said water company shall convey absolutely to said city of Santa Cruz, all its property, rights, titles, and franchises, to have and to hold forever subject only to the mortgage and to the deed of trust or escrow, hereinbefore mentioned."

The deed of conveyance of the water plant to the city further recites (p. 184):

"AND, WHEREAS, the said system of water works has been fully completed to the satisfaction of the party of the second part [the city of Santa Cruz], and said water works have been accepted by it:

"Now, therefore, the party of the first part, in consideration of the premises and of the sum of one dollar," etc.

Then the said deed grants and conveys the said water-works plant to the said city in due form, with *habendum*, as follows (p. 184):

"TO HAVE AND TO HOLD the same and every part thereof unto the said party of second part, its success-

ors and assigns, subject, however, to said mortgage or deed of trust, and all the obligations thereby imposed, which bonds, mortgage or deed of trust, and obligations, the party of the second part agrees to pay and perform."

It thus appears that the water-works plant was, in equity, the property of the city from the beginning, the city from the beginning having the right to acquire it, as it did on the payment of the stipulated purchase price. The water company was, by virtue of these stipulations, its contractor or trustee for the purpose of constructing for the city the water-works plant, and agreed to convey it to the city on payment of the stipulated price. The conveyance was accordingly made, and contains the covenant on the part of the city, as part of the purchase price of the property, to pay the $89,000 remaining unpaid upon the mortgage, which, with the consent of the city, the contractor had made to raise the money to construct the works.

Our proposition is that the said ordinances, Numbers 314 and 315, did not show, or give notice, on their face, that the said $89,000 bonds of the water company thus assumed and agreed to be paid by the city were not bonded indebtedness of the city of Santa Cruz within the meaning of the refunding act of March 1, 1893, which authorized the refunding of bonded indebtedness of the city.

Section 1 of the Statute of California authorizing the issue of refunding bonds provides:

"Whenever any incorporated city or town other than cities of the first-class in this State has an outstanding indebtedness evidenced by bonds and warrants thereof, the common council, board of trustees or other governing body thereof shall have power to submit to the qualified electors of such city or town, at an election to be held for that purpose, the question of refunding such indebtedness," &c.

City, as purchaser of Water Works Plant, having assumed and agreed to pay, as part of purchase price, the Water Company mortgage and bonds, became primarily liable to pay such bonds, and they became part of the bonded indebtedness of the city.

The proposition which we here state is that, inasmuch as the City of Santa Cruz purchased the water company's plant subject to the mortgage made by the water company, and assumed and expressely agreed to pay the said water company's bonds, the city of Santa Cruz thereby became indebted for and bound to pay the said bonds, the city thus becoming the principal debtor upon the said bonds. The deed of conveyance from the water company to the city expressly provides as follows (Record, p. 184) :

" Subject, however, to said mortgage or deed of trust and all the obligations thereby imposed, which bonds, mortgage or deed of trust and obligations the party of the second part [the city of Santa Cruz] agrees to pay and perform."

This deed was received and accepted by the city, and filed for record by the city clerk (Record, p. 185),

We submit that on these facts it is clear, within the numerous decisions of the State of California, that the city of Santa Cruz became primarily liable for the payment of the bonds of the water company.

In the case of *Williams vs. Naftzger*, 103 Cal., 438, the court says (p. 440) :

" An agreement on the part of a grantee to pay and discharge a mortgage debt upon the granted premises, for which his grantor is liable, renders the grantee liable therefor to the mortgagee, and in an action for the foreclosure of the mortgage, if the mortgaged

premises are insufficient to satisfy the mortgage debt, judgment may be rendered against him as well as against the mortgagor for the amount of such deficiency. This liability results from the familiar doctrine in equity that a creditor is entitled to the benefit of all securities or collateral obligations that his principal debtor may have given to the surety for the payment of the debt. By the conveyance of the mortgaged premises and the assumption of the mortgage debt by the grantee, the latter, as between him and his grantor, becomes primarily liable to the mortgagee, and his vendor becomes his surety (*Halsey vs. Reed*, 9 Paige, 452; *Crowell vs. Currier*, 27 N. J. Eq., 154; *Crawford vs. Edwards*, 33 Mich., 354; *Keller vs. Ashford*, 133 U. S., 622; *Biddel vs. Brizzolara*, 64 Cal., 354; Jones on Mortgages, secs. 741, 752)."

That the grantee in such a case becomes primarily liable to pay the debt see, also, *Roberts vs. Fitzallen*, 120 Cal., 482; *Tuohy vs. Woods*, 122 Cal., 665.

So, also, in the case of *Alvord vs. Spring Valley Gold Company*, 106 Cal., 547, a California corporation had taken a deed executed by another corporation subject to indebtedness of the grantor corporation secured by a certain mortgage therein mentioned. The court says (p. 552):

"The deed referred to contains an unequivocal recognition of the mortgage in question as a valid and subsisting obligation and lien on the property, and a promise to pay it as a part of the consideration for the conveyance. It is settled by an almost unanimous line of decisions in this country, approved by all text writers, that such a recital in a deed, even when the deed is not executed by the grantee, is conclusive evidence in favor of the mortgagee and against the grantee in the deed of the existence and validity of the mortgage."

In *Weaver vs. McKay*, 108 Cal., 546, a conveyance was made subject to a certain mortgage which the grantees therein assumed and agreed to pay. The court held that the grantees thereby assumed payment

of the mortgage debt, and became liable to pay judgment for deficiency if the land did not sell for enough to pay the debt.

In *Hopkins vs. Warner*, 109 Cal., 133, the court says (p. 136):

"By the purchase of the mortgaged premises, and the agreement on the part of the purchaser to discharge the mortgage debt, there results, as between the mortgagor and his grantee, a substitution of the liability to the mortgagee, by which the grantee becomes the principal debtor to the mortgagee, and the liability of the mortgagor merely that of a surety for his grantee. This agreement of the grantee to discharge the mortgage debt is an obligation in the hands of the mortgagor, which the mortgagee may enforce for his own benefit when he seeks to obtain satisfaction of the mortgage debt, to the same extent that it could be enforced by the mortgagor."

So, also, in *Tulare County Bank vs. Madden*, 109 Cal., 312, the deed of conveyance recited a mortgage, and that the second party "assumes and agrees to pay the said amount due thereon." The court held that *the grantee was liable on the mortgage as the principal debtor, and that a deficiency judgment was properly rendered against him* on the foreclosure of the mortgage.

To the same effect see *Keller vs. Ashford*, 133 U. S., 610.

See, also, on this point JONES on *Mortgages*, 5th edition, section 749 *et seq.*

In order that the grantee may be personally liable to pay the mortgage debt, it is not necessary that he should sign the deed or any obligation.

JONES on *Mortgages*, section 752, states this matter as follows:

"To create a liability on the part of the grantee to pay an existing mortgage, it is not necessary that he should sign the deed or any obligation; his acceptance of a deed imposing this obligation upon him is all that is necessary."

See also on this point the several California cases above quoted.

For these reasons we say that the bonds and mortgage of the water company, thus assumed and agreed to be paid by the city, did in fact and in law constitute "an indebtedness of the city evidenced by bonds thereof" within the meaning of the refunding statute.

Let us consider the position taken by the city as respects this alleged defense to the refunding bonds. The proposition of the city is that any purchaser of the refunding bonds, if he had examined the ordinance calling the election and the notice of election, would have seen on the face thereof that the city was refunding these bonds of the water company which the city had expressly assumed and agreed to pay, which fact of assumption and agreement to pay is stated upon the face of the said ordinance and notice of election. The ordinance, No. 314, calling the election refers to these water bonds as follows (Additional Finding, No. 1, Record, p. 26):

"Which said bonds outstanding were, at the time of the conveyance by the City Water Company of Santa Cruz to the city of Santa Cruz, of the property known as the city water works, and now are, a valid lien and charge upon said property known as the city water works, and became thereby a part of the bonded indebtedness of the city of Santa Cruz."

Consider what impression and information this statement would give to a proposed purchaser of the refunding bonds if he had examined such ordinance and notice of election. It seems to us clear that any one reading this statement in the ordinance, be he layman or lawyer, would come to precisely the same conclusion regarding the matter as the Supreme Court of California, as stated in the numerous cases above quoted, namely, that the city of Santa Cruz became thereby primarily indebted to pay the bonds of the water company. This is the fair, practical and common sense view of the matter. It is a view which deals with the substance and real legal effect of the transaction, whereas the view taken by the city is one which can only be adopted, if at all, by raising and finding an artificial distinction and not looking at the real substance of the matter.

Bear in mind, moreover, that this is a defense which is sought to be raised against the *bona fide* purchaser of the refunding bonds. As we have shown in our argument, Point I., *supra*, p. 92, the question whether a *bona fide* purchaser is to be held affected with notice of any illegality is to be determined by an examination of the question whether such *bona fide* purchaser was guilty of bad faith in making his purchase. Applying this test in the present case, it is perfectly obvious that no proposed purchaser of the refunding bonds would be guilty of bad faith in purchasing the said bonds, even if he had seen or read the ordinance and notice of election authorizing the same. This ordinance would have informed him that the city was issuing these refunding bonds to refund in part bonds issued by the water company, but it would also have informed him that these bonds had, by the con-

veyance of the property by the Water Company, subject to the mortgage, the city agreeing to pay the bonds, become in law and in fact a part of the bonded indebtedness of the city.

The question whether these water bonds of the city of Santa Cruz had become a part of the bonded indebtedness of the city was a question which the city council must necessarily determine before issuing the bonds. They made and set forth in the ordinance calling the election their finding that the said bonds had "become thereby a part of the bonded indebtedness of the city of Santa Cruz." This was sanctioned by the vote of the qualified electors. This finding of the council was in itself a decision by the tribunal appointed by the refunding act to pass upon the question of issuing the refunding bonds. This decision involved a mixed question of law and fact, and the decision of this appointed tribunal is, under the numerous decisions of the Supreme Court of the United States, conclusive as respects the holder of the refunding bonds. Any other conclusion would involve the proposition that whenever indebtedness is refunded the proposed purchaser of the refunding bonds must go back and trace the indebtedness to its beginning and ascertain at its peril whether the said indebtedness is in all respects valid.

There is no specific finding by the court that the deed of conveyance was executed and delivered; but that fact is necessarily implied in the findings that were made. The court does find (Additional Finding of Fact No. 1, Record, p. 26, and Finding of Fact No. 5, Record, p. 19) that the city council passed Ordinance No. 314. The said Ordinance No. 314 expressly recited as follows, with re-

spect to the $89,000 bonds issued by the City Water Company of Santa Cruz :

" Said bonds outstanding were, at the time of the conveyance by the City Water Company of Santa Cruz to the city of Santa Cruz, of the property known as the city water works, and now are, a valid lien and charge upon said property known as the city water works, and became thereby a part of the bonded indebtedness of the city of Santa Cruz."

In other words, the court finds that the city council of Santa Cruz, in this Ordinance No. 314, expressly declares that at the time of the conveyance of the water company's property to the city these $89,000 of bonds became thereby a part of the bonded indebtedness of the city of Santa Cruz. Furthermore, here is a distinct recital and statement by the city council of the City of Santa Cruz, in this ordinance, calling the election authorizing the issue of refunding bonds, that these $89,000 bonds have become, *by the said conveyance* of the water company's property to the city subject to the mortgage securing said bonds, a part of the bonded indebtedness of the city of Santa Cruz. These bonds became indebtedness of the city of Santa Cruz, as above stated, by the deed of conveyance expressly providing that the City of Santa Cruz, the grantee therein, should assume and pay the said bonds.

Therefore, both the Circuit Court and the Circuit Court of Appeals erred in holding that the said Ordinance No. 314, and the said Ordinance No. 315 (Record, p. 33), showed that the said $89,000 bonds originally issued by the water company were not bonded indebtedness of the City of Santa Cruz. On the contrary, the express recital of the said Ordinance No. 314 is that those bonds were "a part of the bonded indebtedness of the city of Santa Cruz." How they

became a part of such bonded indebtedness may not have been fully stated in the said Ordinances Numbers 314 and 315, but the ultimate fact, depending partly on law and partly on facts, was expressly stated in the said ordinances.

In order to negative notice of illegality to any purchaser of refunding bonds who read Ordinances 314 and 315, it is enough that the $89,000 water company bonds might, under any conceivable circumtances whatever have become part of the bonded indebtedness of the city, and it is not necessary to show, either by findings of fact or otherwise, that such bonds actually did become part of the bonded indebtedness of the city.

In view of this express statement of the ultimate fact, the following proposition must be true in order that any such defense as that these $89,000 bonds were not a part of the bonded indebtedness of the City of Santa Cruz may be made, even as against any person who had actual notice of the said Ordinances Numbers 314 and 315—namely : It must appear from an inspection of the said ordinances that not only as a matter of fact these $89,000 bonds had not become a part of the bonded indebtedness of the City of Santa Cruz, but also that, as a matter of law, they could not have become a part of the bonded indebtedness of the said city. The burden is not upon the holder of these refunding bonds to show, by some express finding of fact of the court, that these old bonds had become a part of the bonded indebtedness of the City of Santa

Cruz. That fact is sufficiently established by the express recital thereof in the said ordinances. Note that what is claimed by the learned counsel for the city is that these Ordinances Numbers 314 and 315 on their face give notice to any person who actually reads them that these $89,000 bonds are not a part of the bonded indebtedness of the City of Santa Cruz. They clearly do not give such notice, unless the said $89,000 of water company bonds could not, under any state of facts and circumstances whatever, have become a part of the bonded indebtedness of the City of Santa Cruz. It is not necessary for the holders of these refunding bonds, even if they had notice of such Ordinances Numbers 314 and 315, to prove and have a finding of facts and circumstances which did make those $89,000 bonds of the water company part of the bonded indebtedness of the City of Santa Cruz. It is enough, *so far as negativing any notice of illegality in refunding said bonds is concerned*, that such facts and circumstances *might* have existed, and it matters not whether or not they did in fact exist.

The theory advanced by the learned counsel for the city of Santa Cruz, that anyone reading ordinances 314 and 315, would have noticed that these $89,000 bonds were bonds of the water company, and, therefore, could not be refunded, is contrary to the well-settled canons of construction in that their theory wholly disregards and holds meaningless the other language contained in the said ordinances 314 and 315 in the very same sentence in which the said $89,000 bonds are mentioned, which other language expressly states that these bonds are secured by a mortgage on the water company's plant, and that the same has been conveyed to the city, subject to the said mortgage, and

that said $89,000 bonds have become "a part of the bonded indebtedness of the city of Santa Cruz." If any one had read the said ordinances 314 and 315, and if on such reading he had noticed that these $89,000 bonds were issued by the water company, and if he would then have received the impression that these were not bonded indebtedness of the city, he would immediately, in the same sentence, have been informed how and why these bonds had become part of the bonded indebtedness of the city, and would thus have been distinctly reassured on this point. Furthermore, this reassurance was given to him not only by the city council of the city of Santa Cruz, the body chosen expressly to represent the people of the city, but he would also have been reassured by the practically unanimous vote of the qualified voters of the city of Santa Cruz, who, after the notice of election, had expressly and specifically informed them that these $89,000 water company bonds were to be refunded by the issue of the bonds now in question, voted overwhelmingly in favor of the refunding of these very $89,000 water company bonds.

We are now dealing with the question of what notice of illegality, if any, is conveyed by the said Ordinances Numbers 314 and 315, and our proposition is that if, under any facts or circumstances which might have existed (whether they actually existed or not is immaterial), the said $89,000 bonds of the water company could have become a part of the bonded indebtedness of the City of Santa Cruz, then no notice of illegality in refunding said $89,000 of bonds would have been conveyed to any person who actually read the said Ordinances Numbers 314 and 315.

It is well-settled law in California and elsewhere

that any person who takes a deed of conveyance subject to a mortgage, and agreeing to assume and pay a bond or other obligation secured by the said mortgage, thereby becomes liable, and primarily liable, to pay such bond or other obligation. The authorities on this point in the Supreme Court of the State of California are numerous.

See Cases on this Brief, *supra*, pp. 118-120.

The City had Power to Purchase Water Works.

But it may be objected by the learned counsel for the City of Santa Cruz that the City of Santa Cruz had no power or authority to purchase the said water works subject to the mortgage securing the said $89,000 of bonds, and agreeing to pay the said bonds. Such, we submit, is not the law in California. The said act of March 15, 1887 (Session Laws of California, 1887, p. 120), under which certain water-works bonds were issued, and under which, also, the city acquired its water works, expressly authorizes "the acquisition, construction or completion of any permanent municipal building, work, sewer, property, water rights, bridges or improvement, the cost of which is too great to be paid for out of the ordinary annual income and revenue of the municipality." [This Act is reprinted in the Appendix to this brief, *post*, p 304.]. There was, therefore, in the present case, express power, conferred by law upon the City of Santa Cruz, to purchase the said water works. This was general power to purchase, and there was no prohibition upon the city's purchasing water works subject to an existing mortgage thereon, or assuming and agreeing to pay such mortgage.

But it may be argued by the learned counsel for the city that the constitution of the State of California prohibited the City of Santa Cruz from purchasing these water works subject to the said mortgage, and assuming to pay the said $89,000 of bonds. An examination of Article XI., Section 18, of the constitution, however, shows that this is not the fact. In order to incur such indebtedness it would only be necessary to have a vote of the qualified electors, and to make provision for an annual tax to pay the interest and a sinking fund to pay the principal. For aught that appears on the face of the said Ordinances Numbers 314 and 315, all of these provisions might have been complied with as respects the said $89,000 of bonds assumed and agreed to be paid by the City of Santa Cruz. The said ordinances, therefore, did not on their face convey any notice to a person actually reading them that the voters of the city had not voted in favor of purchasing the property subject to the mortgage, and assumed to pay the said bonds, and made provision for a tax for interest and sinking fund.

It may possibly be further objected by the learned counsel for the City of Santa Cruz that the said act of March 15, 1887, contemplates that the cost of any public improvement acquired thereunder shall be paid by the issuance of bonds of the city. This fact, however, would not necessarily prevent the city from purchasing the water works subject to the said mortgage and assuming to pay the said $89,000 water company bonds. The said act of March 15, 1887, provides for and authorizes the submission to the qualified voters of a municipality of the "proposition of incurring a debt for the purpose set forth in the ordinance." Under this act of March 15, 1887, therefore, the city council

of the City of Santa Cruz may have passed an ordinance describing the proposed purchase of the water works by the city from the water company, and might have included, as a part of such proposed purchase, the taking of the property subject to the mortgage made by the water company and assuming to pay the said $89,000 of bonds, and providing for the payment of such bonds either by the levying of a tax or the issuing of new bonds under the said act of March 15, 1887. All of this may have been done in respect of these $89,000 of bonds of the water company, which the said Ordinances Numbers 314 and 315 expressly recited became a part of the bonded indebtedness of the City of Santa Cruz. Therefore, any person reading these Ordinances Numbers 314 and 315 would not have had any notice from the face of said ordinances that this proposition for the purchase of the water company's plant subject to the mortgage, the city assuming and agreeing to pay the said $89,000 of bonds, had not been fully submitted to the electors under the said act of March 15, 1887—*i. e.*, would *not* have had notice that the facts recited in the bonds were not true.

Both the Circuit Court and the Circuit Court of Appeals, therefore, erred in holding that any person merely by reading the said Ordinances Numbers 314 and 315, would have notice, both as a matter of law and as a matter of fact, that the said $89,000 bonds of the water company, which the said ordinances state had become "a part of the bonded indebtedness of the city of Santa Cruz," had not become a part of the bonded indebtedness of the city of Santa Cruz. Not only is it consistent with what appears on the face of the said ordinances, that they had become a part of

such bonded indebtedness of the city of Santa Cruz, but there is the express recital and statement that they have become a part of such indebtedness.

Not only so, but the refunding bonds themselves recite that "this bond is one of a series of bonds of like date, tenor and effect issued by the said city of Santa Cruz for the purpose of refunding the bonded indebtedness of the said city." That is to say, the refunding bonds themselves recite that all of the indebtedness which these refunding bonds are issued to refund was "the bonded indebtedness of the said city," which is the precise language of the enabling act.

Of course the holders of these refunding bonds, even if they had seen the said Ordinances Numbers 314 and 315, would not have been bound to go outside of the said ordinances and examine all the facts *in pais* to see whether or not the said $89,000 bonds issued by the water company had become a part of the bonded indebtedness of the city of Santa Cruz. It was *bonded* indebtedness, and it might have become a part of the bonded indebtedness of the *city*, and not only so, but it was expressly stated that it had become a part of the bonded indebtedness. There is nothing in the said ordinances, in respect of these $89,000 of bonds, to create any suspicion on the part of any person proposing to purchase the refunding bonds. It is an ordinary occurrence for property to be purchased subject to a mortgage, the purchaser expressly assuming and agreeing to pay the obligation secured by such mortgage. There was nothing to indicate that the statement as respects these bonds in the said Ordinances Numbers 314 and 315 was at all improbable or unlikely. On the contrary, the purchase of the property and the assumption of these bonds by the city was not only a

possible, but a very probable, occurrence, and one not calculated to arouse any suspicion.

Must be Actual Notice or Bad Faith in Order to Defeat Plaintiff's Recovery.

Where it is sought to affect the bona fide purchaser for value of commercial paper with constructive notice, the question is not whether there were grounds of suspicion, or even gross negligence on his part, but the question is whether he has acted in bad faith.

In *Murray vs. Lardner*, 2 Wall., 110, Murray had loaned money on some coupon bonds payable to bearer, to a person whom he did not know, and under circumstances which might, perhaps, have excited suspicion as to the title of such person to the bonds. The court in its charge submitted to the jury (p. 113):

"Whether there were such circumstances of the character which I have described to you as would warrant the inference that there was ground of suspicion, and that he should have made further inquiry as to the character of the paper."

The Supreme Court of the United States held that this was error and reversed the judgment. The court (Mr. Justice SWAYNE delivering the opinion), in reviewing the English cases and preceding cases in this court, says (p. 121):

"In *Goodman vs. Simonds*, 20 Howard, 343, the subject was elaborately and exhaustively examined both upon principle and authority. That case affirms the following propositions:

"The possession of such paper carries the title with it to the holder: 'The possession and title are one and inseparable.'

"The party who takes it before due for a valuable consideration without knowledge of any defect of title and in good faith, holds it by a title valid against all the world.

"Suspicion of defect of title or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man or gross negligence on the part of the taker at the time of the transfer, will not defeat his title. *That result can be produced only by bad faith on his part.*

"The burden of proof lies on the person who assails the right claimed by the party in possession.

"Such is the settled law of this court, and we feel no disposition to depart from it."

So, also, in *Swift vs. Smith*, 102 U. S., 442, this court (Mr. Justice STRONG, giving the opinion), says, regarding the purchase of a negotiable note (p. 444):

"There is nothing in the case to show that Smith's purchase was not in good faith. There was nothing upon the note nor anything in the indorsement thereon to notify him that it did not belong to Jackson, both legally and equitably. It was mercantile paper and not due. One who purchases such paper from another, who is apparently the owner, giving a consideration for it, obtains a good title, though he may know facts and circumstances that cause him to suspect, or would cause one of ordinary prudence to suspect, that the person from whom he obtained it, had no interest in it or authority to use it for his own benefit, and though by ordinary diligence he could have ascertained those facts (*Goodman vs. Simonds*, 20 How., 343). *He can lose his right only by* ACTUAL NOTICE OR BAD FAITH."

See, also, to the same effect *Goetz vs. Bank of Kansas City*, 119 U. S., 551, 560.

Even as respects non-negotiable property, like real estate, this Court, in *Wilson vs. Wall*, 6 Wall., 83, treating of constructive notice, quotes with approval (p. 91) *Sugden on Vendors*, as follows:

"In *Ware vs. Lord Egmont*, the Lord Chancellor Cranworth expressed his entire concurrence in what, on many occasions of late years, had fallen from judges

of great eminence on the subject of constructive notice, namely, that it was highly inexpedient for courts of equity to extend the doctrine. When a person has not actual notice he ought not to be treated as if he had notice unless the circumstances are such as enable the Court to say, not only that he *might have acquired*, but also that he ought to have acquired it but for his gross negligence in the conduct of the business in question. The question then, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining and might, by prudent caution, have obtained the knowledge in question, but whether not obtaining was an act of gross or culpable negligence."

Further, as to constructive notice, see said case of *Ware vs. Lord Egmont*, quoted *infra*, pp. 299, 300.

No "Bad Faith" on Part of Purchaser of Refunding Bonds, Even if He Had Purchased After Reading Ordinances 314 and 315.

Applying these principles to the present case, it is obvious that even if any holder of these bonds had read the ordinances, numbers 314 and 315, and had seen there that the city of Santa Cruz was issuing bonds to refund $89,000 bonds of the water company, secured by mortgage on the property conveyed to the city accompanied by the express recital in said ordinances that "said bonds outstanding were, at the time of the conveyance by the city water company of Santa Cruz, to the city of Santa Cruz, of the property known as the City Water Works, and now are, a valid lien and charge upon the said property known as the city water works, and became thereby a part of the *bonded indebtedness of the city of Santa Cruz*," any purchaser of these refunding bonds in the market, we say, reading the said ordinances, numbers 314 and 315,

containing such provisions, would not have been guilty of any "*bad faith*" or of "*gross negligence*" in accepting the statement of the City Council in the said ordinances that the said $89,000 bonds issued by the water company had become part of the "bonded indebtedness" of the city of Santa Cruz. Not only would such purchaser not have been guilty of any "bad faith," but he would not have had any reason to suspect that this statement that these $89,000 of bonds of the water company had become part of the bonded indebtedness of the city of Santa Cruz was in the least untrue, nor would he have been guilty of any negligence, much less gross negligence, in not investigating further after he had seen this express statement and assurance made by the city council of Santa Cruz of this very fact, namely, that such indebtedness had "*become a part of the bonded indebtedness of the city of Santa Cruz.*" It was on its face a very natural and probable fact, consistent with every-day experience, that a city should buy a water company's plant subject to an existing mortgage, and assume and agree to pay the same.

We say, therefore, that any one reading said ordinances 314 and 315 would not have received any notice, actual or constructive, of any illegality in the issuance of the said refunding bonds from the fact that said ordinances recite that the bonds are issued in part to refund $89,000 bonds of the water company, which had become part of the bonded indebtedness of the city of Santa Cruz. And especially would he not have received any notice that the recitals in the refunding bonds were not true.

For these reasons we submit that, even if this court shall be of opinion that the holder of the refunding bonds had constructive notice of the ordinance calling the election, and also of the notice of election, which, however, we respectfully submit and show, under point I. of this brief, is contrary to the numerous decisions of the Supreme Court of the United States, yet the holder of such refunding bonds, if he had read such ordinance and notice of election, would not have received notice of any illegality in the issue of the bonds, and would not have been guilty of any fraud or bad faith in taking the refunding bonds. On the contrary, he would have been informed and assured by the solemn recital contained in the bonds and also made by the city council of Santa Cruz that the water bonds had "become a part of the bonded indebtedness of the city of Santa Cruz." Even under this view, therefore, the holder of these refunding bonds is entitled to recover in this action.

City Bound by its Construction of the Enabling Act, Concurred in by its City Council and its Qualified Voters.

Even if there could on any theory be any fair doubt as to whether or not the said refunding act of March 1, 1893, authorized the refunding of the $89,000 bonds of the water company which had been assumed and agreed to be paid by the City of Santa Cruz, and had thus become a part of the bonded indebtedness of the City of Santa Cruz, then, inasmuch as the city authorities of Santa Cruz, acting for and on behalf of the city, and as the city's authorized officers, gave to this statute the con-

struction that it authorized the refunding of such bonds, and on such construction the voters of the city, by a vote of 725 for bonds to 22 against bonds, expressly authorized the refunding of these very $89,000 water company bonds (they being expressly mentioned in name in the notice of election), and on such construction the city issued these bonds and delivered them, with recitals that they were issued to fund the bonded indebtedness of the City of Santa Cruz, and they have come into the hands of *bona fide* purchasers thereof who have paid out their money on the faith of these acts of the City of Santa Cruz and of their authorized officers—we say that if even such construction of the statute were doubtful, then, under all these circumstances, the courts should and will hold the city to its construction of the statute and to the validity of its acts, so far as respects the *bona fide* holders of these bonds.

A case precisely in point is *Van Hostrup vs. Madison City*, 1 Wall., 291 (1863). This was an action brought against the City of Madison, Indiana, on certain coupons attached to bonds issued by the city, which bonds (p. 291) "promised to pay the president of the *Columbus and Shelby* Railroad Company, *or bearer*, $7,000," etc., etc. The city charter authorized the city to borrow money and subscribe stock (p. 292) "for making a road or roads *to* said city"—*i. e.*, to Madison.

(p. 292:) "The Columbus and *Shelby* Company (the company to which the subscription was made), was organized to construct a road from Columbus to Shelby County, terminating at Shelbyville. *But Columbus was forty-six miles from Madison;* Shelbyville being about twenty-three miles north of *it*. Through Columbus, and by means of the connection

with the Madison and *Indianapolis* road, the Columbus and Shelby road did lead to Madison and nowhere else; though if regarded as an independent and isolated road, and as one between Shelby and Columbus only, it could not be said to be a road *to* the city designated. The diagram [printed in the record, p. 292] will elucidate the matter."

The defense to the coupons was that the (p. 293)

" said Columbus and Shelby Railroad Company was not a chartered company for the purpose of making a road *to* the city of Madison aforesaid, but to make a road from Columbus to Shelbyville, the nearest terminus of said road being forty-six miles distant from Madison."

It was shown, too, on the face of these bonds (p. 291) that they were issued to " the *Columbus and Shelby* Railroad Company, or bearer." This court, however, held these coupons valid and reversed the judgment of the lower court, which held them invalid. Mr. Justice NELSON, giving the opinion of the court, after stating that although the said Columbus and Shelby Railroad did not run to Madison, yet it might possibly be construed as " a road or roads to the said city," within the meaning of the charter, said (p. 297):

" Our conclusion upon the whole case is, that full power existed in the defendants to issue the bonds, and that the plaintiffs are entitled to recover the interest coupons in question. Even if the case had been doubtful, inasmuch as the city authorities have given this construction to the charter, and bonds have been issued and in the hands of *bona fide* puschasers for value, we should have felt bound to acquiesce in it."

The notice of election distinctly informed the citizens and voters of the city of Santa Cruz that the city council intended to refund the $89,000 bonds of the

City Water Company, which had been assumed and agreed to be paid by the city. The said notice of election is as follows (Additional Finding of Fact No. 2, Record, p. 34):

"NOTICE OF SPECIAL ELECTION.

To the qualified electors of the city of Santa Cruz, and to all whom it may concern:

Notice is hereby given that a special election has been duly and regularly called, and will be held in and for the city of Santa Cruz, on Tuesday, the thirteenth day of March, 1894, at which there will be submitted to the qualified electors of said city the question of refunding the following bonded indebtedness of said city of Santa Cruz, issuing bonds therefor and providing for the payment of the same, viz:

* * * * * *

(2.) Eighty-nine (89) first-mortgage bonds (with interest thereon from November 1, 1893), of the corporation, the City Water Company of Santa Cruz, heretofore issued by said corporation, the City Water Company, of Santa Cruz, which bonds bear date May 1, 1890, and are of the denomination of one thousand (1,000) dollars each, and bear interest at the rate of six (6) per cent. per annum, payable semi-annually, and are secured by a mortgage or deed of trust upon the property known as the city water works of Santa Cruz, executed by the City Water Company of Santa Cruz, as party of the first part therein, to the Holland Trust Company, of New York, as trustee, party of the second part therein, and which said bonds outstanding, were, at the time of the conveyance by the City Water Company of Santa Cruz to the city of Santa Cruz of the property known as the city water works, and now are, a valid lien and charge upon said property known as the city water works, and became thereby a part of the bonded indebtedness of the city of Santa Cruz;" etc.

Thus, the people of the city of Santa Cruz were distinctly and specifically informed that these $89,000 water company bonds were to be refunded, if the people of the city so voted, and they did so vote.

Furthermore, the people of the city of Santa Cruz were distinctly and specifically informed that these bonds were to be refunded by the issue of *negotiable* bonds—that is, bonds payable to bearer, and passing from hand to hand by delivery. The notice of election set forth the form of the refunding bonds (Record, p. 36). Still further, the said refunding bonds, the form of which was set forth in the notice of election, recited that they were issued

" for the purpose of refunding *the bonded indebtedness of said city* and issuing bonds therefor, and providing for the payment of the same, under and in pursuance of, and in conformity with, the provisions of an act of the legislature of the State of California, entitled," etc. (giving the title of the refunding act approved March 1, 1893).

The voters of the city of Santa Cruz, by 735 votes for and 22 votes against, thus expressly and distinctly authorized the issue of these refunding bonds to refund the $89,000 water company bonds, and authorized the issue of such negotiable refunding bonds, payable to bearer, and containing the recital above quoted, that they were issued " for the purpose of refunding the bonded indebtedness of said city."

Not only did the people of the city of Santa Cruz, by a vote of 735 votes for to 22 against the issue of these refunding bonds, expressly authorize their issue, but not one person in all the city of Santa Cruz made any effort to prevent, as illegal, the issue of bonds to refund the $89,000 water company bonds. This thing was not done in a corner. The proceedings for the issue of these bonds were all open and public, thoroughly advertised, and known to everybody in the city. No injunction proceedings to stop the issue of these refunding bonds were taken by any interested person. The city officers issued these refunding

bonds, acting by this unanimous vote and sanction of the people of the city, and no hand was raised to stop them. The city and its officers thus authorized and issued these bonds, well knowing that they might come into the hands of innocent purchasers. Under these circumstances there can be but one answer to the question as to whether, under the law, as well as under moral justice, the innocent bondholder should suffer, or the city of Santa Cruz should be held to that construction which the city, and its officers, and its qualified voters all unitedly put on this refunding act as authorizing the refunding of these $89,000 bonds.

Moreover, we insist that this vote of the people had the effect to expressly ratify the $89,000 for the water plant, and made it city "indebtedness evidenced by bonds," within the meaning of the enabling act (Jasper County case, ante, pp. 84, 85; Saline County case, ante, pp. 85, 86).

Recovery should have been allowed by the court on the three coupons of the Northern Counties Investment Trust Company, Limited, as well as upon all the other coupons and bonds involved in the present action.

Even if any one had actually read the said ordinances Numbers 314 and 315, he would have had no knowledge or notice that the refunding bonds had been illegally issued because issued in part to take up and pay certain bonded indebtedness of the water company, which, on the conveyance of the property of that company to the city, had been assumed and agreed to be paid by the city. For this reason the

Circuit Court erred in holding (Record, p. 25) that recovery could not be had in the present case on the three coupons owned by the Northern Counties Investment Trust Company, Limited, referred to in Finding of Fact No. 3 (Record, p. 18), which Finding of Fact is as follows:

"3. The Northern Counties Investment Trust Company, Limited, is the real owner of three of the coupons upon which this action is brought, and were attached to bonds numbered *numbered* 181, 182 and 183, dated April 16, 1894. Said Northern Counties Investment Trust Company, Limited, at and prior to the time of becoming owner of said bonds, had notice that the same had been illegally issued by the city of Santa Cruz for the purpose of refunding and taking up certain bonded indebtedness of the City Water Company of Santa Cruz."

The only reason for such holding was that the said Northern Counties Investment Trust Company, Limited, had notice that the bonds had been issued by the city of Santa Cruz "for the purpose of refunding and taking up certain bonded indebtedness of the City Water Company of Santa Cruz." The word "illegally," inserted in this Finding of Fact, is a mere conclusion of law by the court, and does not affect the finding.

The testimony confirms this statement of the effect of the third finding of fact by the court. Mr. Booth testified as follows (p. 128):

"I am secretary of the Northern Counties Investment Trust (Limited). In the month of September, 1893, the trust company received from the American Debenture Co., through Coffin & Stanton, Limited, three bonds of $1,000 each of the City Water Company of Santa Cruz, California, as part collateral for a loan of $1,000. In the month of May, 1894, the said bonds were exchanged for three bonds of the city of Santa Cruz, purporting to be executed by its officers on the sixteenth day of April, 1894," etc., etc.

Mr. Booth further testified (p. 129) :

" The trust company, at the time it came into possession of these bonds, had no knowledge or notice relative to the title to the same of the person or persons from whom it received possession, nor as to the relations between Walter Stanton and the defendant. It made no investigation with reference to the indebtedness of the defendant existing at the time these bonds were taken."

This testimony shows that the Northern Counties Investment Trust Company, Limited, had no notice of any illegality in the issue of the said bonds, unless it be that they were illegal, because issued for refunding and taking up certain bonded indebtedness of the City Water Company of Santa Cruz, which had been assumed and agreed to be paid by the city on its purchase of the water plant, and this testimony shows that this is the only illegality meant by the court in its finding of fact Number 3 (Record, p. 12), as to notice to the Northern Counties Investment Trust Company, Limited.

We therefore submit that recovery should have been allowed on these three coupons, as well as upon all the others involved in this action.

CERTAIN FURTHER ALLEGED DEFENSES RAISED BY THE DEFENDANT IN THE CIRCUIT COURT AND IN THE CIRCUIT COURT OF APPEALS CONSIDERED, AND SHOWN TO HAVE NO MERIT WHATEVER.

The foregoing part of this brief covers all the questions on which the Circuit Court of Appeals decided this case ; and we might, perhaps, well end our brief

here. We find, however, on examining the briefs as submitted by the counsel for the defendant the City of Santa Cruz, in the Circuit Court of Appeals, that certain other defenses to the bonds were attempted to be made, and, as some of those alleged defenses may possibly be urged in this Court, we proceed to consider them, and to show that none of them has any merit whatever. These defenses were made before the Circuit Court, and the learned judge who rendered the decision of the Circuit Court held that none of such alleged defenses was good. The judgment and opinion of the Circuit Court in this respect are clearly right, and the Circuit Court of Appeals, in its opinion, did not express any views contrary to the decision of the Circuit Court as respects these defenses. In other words, neither of the courts below held any of these defenses good. We proceed now to consider the same.

A.

The diverse citizenship of the parties sufficiently appears on the record in this action. There is no ground for the plaintiff's objection to the jurisdiction of the Circuit Court in this respect. The Circuit Court and the Circuit Court of Appeals committed no error in holding that the United States Circuit Court had jurisdiction of this case.

The complaint (Record, p. 3) alleges that the plaintiff Waite is a resident and citizen of the State of Massachusetts, and that the defendant The City of Santa Cruz is a municipal corporation organized and exist-

ing under a certain statute of the State of California, citing the statute.

These allegations were not denied in the answer, and, therefore, they stand admitted on the record, and there was no need of any finding of fact in regard to them. This is the rule at common law, and is also the rule under the practice and pleading in California. See *First National Bank of Los Angeles vs. Maxwell*, 123 Cal., 360, 366, where the court says, concerning a certain fact (p. 366):

"It was so alleged in the complaint, and not denied in the answer. A finding is unnecessary where a fact is admitted by the pleadings."

As the bonds and coupons are payable to bearer, it is no objection to the jurisdiction that they were assigned to plaintiff for collection only.

It is not necessary either to allege or prove that the assignors of the plaintiff could have maintained a suit on these bonds and coupons in the United States Circuit Court. These bonds are promissory notes, or choses in action, payable to bearer, and made by a corporation, and are, therefore, within the exception of the act of Congress of March 3, 1887, Chapter 373, 24 Stat., 552, as corrected by the act of August 13, 1888, Chapter 866, 25 Stat., 433, and, therefore, it is immaterial whether the plaintiff's assignors could sue or not, and it is not necessary that the complaint contain any averment that the suit could have been maintained by the assignors of the plaintiff, nor is it necessary that any finding to that effect be made. This precise point has been expressly determined by this Court in the recent case of *New Orleans vs. Quinlan*, 173 U. S., 191

(1899). Chief-Justice FULLER, giving the opinion of the Court, says (p. 191):

"This was an action brought in the Circuit Court of the United States for the Eastern District of Louisiana by Mary Quinlan, a citizen of the State of New York, against the city of New Orleans, to recover on a number of certificates owned by her, made by the city, and payable to bearer. **Defendant excepted to the jurisdiction because the petition contained no averment that the suit could have been maintained 'by the assignors of the claims or certificates sued upon.'"**

The Court, after referring to the Judiciary Act of 1879, and the act of March 3, 1875, says (p. 192):

"By the first section of the act of March 3, 1887, c. 373, 24 Stat. 552, as corrected by the act of August 13, 1888, c. 866, 25 Stat. 433, the provision was made to read as follows: 'Nor shall any Circuit or District Court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder, if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made.'

These certificates were payable to bearer and made by a corporation; they were transferable by delivery; they were not negotiable under the law merchant, but that was immaterial; they were payable to any person holding them in good faith, not by virtue of any assignment of the promisee, but by an original and direct promise, moving from the maker to the bearer. *Thompson* v. *Perrine*, 106 U. S., 589. They were, therefore, not subject to the restriction, and the Circuit Court had jurisdiction."

In *Loeb vs. Columbia Township Trustees*, 179 U. S., 472, Mr. Justice HARLAN, giving the opinion of this Court, says (p. 486):

"As, therefore, the bonds in suit were executed by the defendant township, a corporation, and are paya-

ble to bearer, the present holder, being a citizen of a State different from that of which the township was a corporation, was entitled to sue upon them *without reference to the citizenship of any prior holder*. *Thompson* v. *Perrine*, 106 U. S., 589, 592–3. This point was properly decided for the plaintiff."

The " chose in action " in question in *Mexican National Railroad Company vs. Davidson*, 157 U. S., 201, cited by the learned counsel for the city of Santa Cruz, was *not payable to bearer*, and hence not within the exception in the act of Congress of 1887, as corrected in 1888.

The learned counsel for the defendant, The City of Santa Cruz, however, object in their brief in the United States Circuit Court of Appeals that the Circuit Court had no jurisdiction of this action, because it was found by the court (Record, p. 18, Finding of Fact No. 2) :

" That the plaintiff did not pay any money consideration for the assignment to him of any of said bonds or coupons, but all of said bonds or coupons were assigned to plaintiff for collection only."

That fact, however, is no objection to the jurisdiction of this Court and the maintenance of this action. The plaintiff is a *bona fide* holder of these bonds and coupons. A *bona fide* holder is a purchaser for value without notice, or the successor of one who was such purchaser.

McClure vs. Oxford Township, 94 U. S., 429.

These bonds and the coupons are payable to bearer and transferable by delivery, and may be sued upon by the bearer. As the previous holders of the bonds in suit were *bona fide* holders for value (Finding of Fact No. 12, Record, p. 24, and conclusion of Law

No. 2, Record, p. 25), the plaintiff can avail himself of such previous holder's position without showing that he himself has paid value.

Montclair vs. Ramsdell, 107 U. S., 147.

It is no objection to the maintenance of this action that the plaintiff did not pay any money consideration for the assignment to him of any of the said bonds or coupons, but that all of said bonds and coupons were assigned to plaintiff for collection only, for it does not anywhere appear in the pleadings or findings of fact in this case that any of the previous holders of these bonds were residents or citizens of the State of California, and if the evidence could be looked into in this matter, it would show that the previous holders of these bonds were non-residents and not citizens of the State of California.

Bernards Township vs. Stebbins, 109 U. S., 341, is a case directly in point. In that case it appeared that certain citizens of the states of New Jersey, New York and Pennsylvania had delivered bonds and coupons to the plaintiff (p. 347) "*solely for the purpose of bringing suit*" on the same. This Court held that, so far as respects the bonds or coupons owned by the citizens of such states other than the state of New Jersey, the suit could be maintained in the federal court, but could not be maintained as respects the bonds or coupons owned by the citizens of the state of New Jersey, of which state the defendant was a citizen. The Court on this point said (p. 356):

"But no valid objection has been shown to the maintence of these bills, so far as regards those bonds of which the plaintiffs are the bearers, and which are actually owned either by themselves or by other citizens of New York or Pennsylvania, to a sufficient

amount by each owner to sustain the jurisdiction of the circuit court " (citing numerous cases).

This case has never been in the least questioned or overruled.

Accordingly, in the present case, as above stated, the Circuit Court, and also the Circuit Court of Appeals, all of the judges concurring on this point, held that the United States Circuit Court had jurisdiction.

Of course, if it appeared on the record in this case that the federal court had not jurisdiction of the case, then the proper judgment of the Circuit Court of Appeals would not have been to reverse the judgment of the Circuit Court, with direction to enter judgment for the defendant (Record, p. 321), but to reverse the judgment, with direction to dismiss the action, so that any judgment would not be an estoppel. In this view the judgment of the Circuit Court of Appeals would be clearly erroneous, and should be reversed.

Great Southern Fire Proof Hotel Company vs. Jones, 177 U. S., 449, 458.

B.

The Circuit Court had jurisdiction of this action at law on the bonds and coupons in question, notwithstanding the remedy in the State courts might have been by mandamus.

The learned counsel for the City of Santa Cruz undertook to make an argument in the United States Circuit Court of Appeals that the United States Circuit Court, sitting at common law, had no jurisdiction of this action to obtain a personal judgment against the City of Santa Cruz upon the bonds and coupons

in question. The law is well settled to the contrary by numerous decisions of this Court. This is true in the federal courts, although a different remedy might prevail in the state courts, as, for example, where, under state statutes, state courts might, in the first instance, and without any judgment upon the bonds being previously had, issue a writ of mandamus to compel municipal officers to pay the bonds, and, if necessary, to levy a tax for that purpose.

In 2 Dillon on Municipal Corporations, Section 856, the author states the results of the decisions of the courts as follows :

" The remedy of the municipal or county bondholder *in the Federal courts is to sue at law and obtain a judgment* to establish the validity and amount of his debt. Thereupon it is usual to issue execution, if the corporate debtor *can*, by law, have property subject to execution. On a return of the writ *nulla bona* or unsatisfied, application is made upon an information or relation under oath, reciting these facts for a *mandamus* to compel the levy and collection of a tax to pay the judgment " (citing cases).

In the case of the *County of Greene vs. Daniel* and *County of Pickens vs. Daniel*, 102 U. S., 187, this Supreme Court (Mr. Chief Justice WAITE giving the opinion) says (p. 195) :

" In the State courts, under the rule as stated in *Shinbone vs. Randolph County*, 56 Ala., 183, and other cases, a mandamus would lie, without reducing the coupons to judgment, to compel the commissioners' court to levy and collect the taxes necessary to pay what was due. The rule is different, however, in the courts of the United States, where such a writ can only be granted in aid of an existing jurisdiction. There a judgment at law on the coupons is necessary to support such a writ. The mandamus is in the nature of an execution to carry the judgment into effect (*Bath County vs. Amy*, 13 Wall., 244; *Graham vs. Norton*, 15 Wall., 427). A suit, therefore, to get

judgment on the bonds or coupons is part of the necessary machinery which the courts of the United States must use in enforcing the claim, and the jurisdiction of those courts is not to be ousted simply because, in the courts of the State, a remedy may be afforded in another way."

See, also, the case of *Riggs vs. Johnson County*, 6 Wall., 166, a leading case on the issue of a writ of mandamus after obtaining judgment on municipal bonds.

The fact that there was a provision for a tax levy to pay the principal and interest of the bonds now in question, makes no difference as to the method of procedure in the federal courts, namely, by action at law to obtain a judgment on the said bonds, and thereafter, if necessary, a mandamus to compel the levy of a tax, as prescribed by the constitution and statutes of the State.

It was urged by the learned counsel for the City of Santa Cruz, in their brief in the United States Circuit Court of Appeals, that the present bonds and coupons were payable by a special tax out of a particular fund. It is, perhaps, rather difficult to understand exactly what the learned counsel meant by these bonds being payable out of a particular fund. Such is obviously not the fact or the law. When a municipal obligation is spoken of as being payable out of a "special fund," the ordinary meaning is that the obligation is not payable by a tax levied upon all the taxable property in the municipality, but is payable either by some special assessment on only part of the property, or out of some other special fund not raised by a general tax upon all the property in the municipality. The bonds

in question in the present case were not bonds payable out of a special fund in any such sense. The bonds now in question were authorized to be issued, and were issued, as *general obligations* of the City of Santa Cruz —obligations *in personam*—the city promising generally and absolutely to pay the said bonds. It is true that the constitution of the State of California provides (Article XI., Section 18) :

" Before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof on or before maturity, which shall not exceed forty years from the time of contracting the same."

The act of March 1, 1893, under which these bonds were issued (see the Act printed on this brief, pp. 3-5), provides :

" Said common council, or other governing body, shall, at the time of fixing the general tax levy for each year, and in the same manner for such tax levy provided, levy and collect annually, each year, sufficient money to pay one-fortieth part of the principal of such bonds, and also the annual interest upon the portion remaining unpaid."

The ordinances, Number 314, Number 315 and Number 320 (see Findings of the Court, Record, pp. 30, 37 and 21), made provisions similar to those made in the statute for the levy and collection of a sufficient tax to pay the principal and interest of the bonds. These provisions of the constitution and statute and ordinances do not constitute a special fund for the payment of these bonds in any such sense as to relieve the City of Santa Cruz from its general and absolute obligation *in personam* to pay the principal and interest of these bonds. These bonds are not in any such sense

payable out of a special fund, neither is this tax a special tax, nor the fund produced thereby a special fund, as those words are ordinarily understood. *This tax is a general property tax upon all the taxable property in the city*, and it is levied precisely as other general property taxes, and at the same times. It is true that this tax is to be applied to the payment of the principal and interest of these bonds, but this is only saying that this tax is to be used for a certain purpose—namely, for paying the principal and interest of these bonds. How this fact can in any wise operate to deprive the United States Circuit Court, sitting at law, of jurisdiction in this case, passes comprehension. It is not at all inconsistent with the Circuit Court's rendering a judgment *in personam* against the City of Santa Cruz on these bonds, which are its absolute and general obligation, and then afterwards, if necessary, issuing its writ of mandamus to compel the levy and collection of this very tax, and the application of the same to the judgment so obtained.

But however this may be, even if the fund raised by this tax were a " special fund " (whatever the learned counsel for the city may mean by that), still, as these bonds are the general obligation of the City of Santa Cruz, the Circuit Court of the United States, sitting at law, has jurisdiction to render a general judgment against the city thereon, and it makes no difference whether or not the city, as between itself and its taxpayers, obtains the money to enable it to pay these bonds, or such judgment thereon, out of any "special fund," or from general taxation, or from any other source. This precise question has been decided by this Court in the case of *United States vs. Fort Scott*, 99 U. S., 152. In that case, the ordinance authorizing

the issue of the bonds expressly provided that the bonds (p. 159) :

" shall be paid, principal and interest, solely from special assessments, to be made upon and collected solely from the lots and pieces of ground fronting upon and extending along the street the distance improved."

This Court says, Mr. Justice HARLAN giving the opinion (p. 159), that this

" should be regarded only as an expression, in emphatic terms, of the purpose and duty of the city, as between all its taxpayers, to impose the cost of the proposed improvements upon the property specially benefited. There is no reason to presume that the ordinance was intended to mean more than the statute under which it was enacted. The general reference, upon the margin of the bonds, to the ordinance under which the improvement was projected, should not, in view of the general powers of the council, as declared in the statute, be held as qualifying or lessening the unconditional promise of the city, set forth in the body of the bonds, itself to pay the bonds, with their prescribed interest, at maturity. The agreement is that the city shall pay the interest and principal at maturity. There is no reservation, as against the purchasers of the bonds, of a right, under any circumstances, to withhold payment at maturity, or to postpone payment until the city should obtain, by special assessments upon the improved property, the means with which to make payment, or to withhold payment altogether, if the special assessments should prove inadequate for payment."

The Court, therefore, held that a general judgment upon these special improvement bonds of the City of Fort Scott was proper, and that a mandamus to compel the levy of a sufficient tax upon all the taxable property within the city to pay the judgment, interest and costs was proper, and ordered judgment accordingly.

C.

The Act of March 1, 1893, gave Power to Issue Refunding Bonds.

The suggestion or argument of the learned counsel for the city that the said refunding act of March 1, 1893, does not authorize the issuance of bonds is so trivial and wholly without foundation as hardly to require serious consideration. Section 1 of the said act is as follows (Session Laws of California, 1893, p. 59):

"SECTION 1. That whenever any incorporated city or town, other than cities of the first class, in this State, has *an outstanding indebtedness, evidenced by bonds and warrants thereof*, the common council, Board of Trustees, or other governing body thereof, shall have power to submit to the qualified electors of such city or town, at an election to be held for that purpose, the question of refunding such indebtedness. Said election shall be called and held in the same manner in which other elections are held in such city or town. The notice of such election shall recite the indebtedness to be refunded, together with the denomination, character, time of payment, rate of interest, as well as all other details of the bonds proposed to be issued. Such bonds shall be of the character known as 'serials' one fortieth of the principal being payable each year, together with interest due on all sums unpaid. Said bonds may be issued in denominations not to exceed one thousand dollars, nor less than one hundred dollars; principal and interest being payable in gold coin or lawful money of the United States, and either at the office of Treasurer of such city or town, or at a designated bank situated in the cities of San Francisco, New York, Boston, or Chicago. Interest upon the same shall not exceed six per cent. per annum, and may be payable semi-annually. Said bonds shall be sold in the manner provided by such city council, or other governing body, to the highest bidder, for not less than their face value, in the same character of money in which they were payable. The proceeds of such sale shall be placed in the Treasury to the credit of the funding fund, and shall be applied only for the purpose

of refunding the indebtedness for which they have been issued. Said common council or other governing body, shall, at the time of fixing the general tax levy for each year, and in the same manner for such tax levy provided, levy and collect annually, each year, sufficient money to pay one fortieth part of the principal of such bonds, and also the annual interest upon the portion remaining unpaid.

Note that this act not only expressly provides that "the question of refunding such indebtedness" shall be submitted to the qualified electors, but also provides "*such bonds shall be* of the character known as serials," etc.; "*said bonds may be issued*," etc.; "*said bonds shall be sold*," etc. How any one can say, in the face of these express provisions, that this statute does not confer authority and express authority to issue refunding bonds passes comprehension.

Furthermore, this very refunding act of March 1, 1893, was before the Supreme Court of California in the case of *Los Angeles vs. Teed*, 112 Cal., 319, and that court expressly held the said act valid and constitutional, and refused to issue a mandamus requiring the president of the city council to sign the refunding bonds of the city of Los Angeles there in question, only because the said bonds were made payable at a bank in the city of New York, instead of being made payable at the office of the city treasurer of Los Angeles. The bonds in question in the present case are made payable at the office of the treasurer of the city of Santa Cruz.

There is, therefore, not the slightest foundation for the suggestion, or argument, of the learned counsel for the city of Santa Cruz that there is not statute authority for the issuance of the refunding bonds now in question.

D.

The act of March 1, 1893, authorizing the issue of the refunding bonds now in question (Session Laws of California, 1893, p. 59), does not violate any provision of the Constitution of California against special legislation. This has been expressly decided by the Supreme Court of California in the City of Los Angeles vs. Teed, 112 Cal., 319. There is, therefore, no foundation for the claim of counsel for the defendant, the City of Santa Cruz, that the act is unconstitutional.

City of Los Angeles vs. Teed, 122 Cal., 319, was an application for writ of mandamus to compel the president of the city council of Los Angeles to sign refunding bonds, proceedings for the issuance of which had been taken under said refunding act of March 1, 1893 (Session Laws of California, 1893, p. 59). It was objected by the counsel for the respondent (see his argument, Report, p. 322) that the act of 1883 and also the act of 1893 were unconstitutional "because they except cities of the first class, and are special and local legislation," citing cases. The court, however, expressly held (p. 328):

"On March 15, 1883, an act was passed (Stats. 1883, p. 370) authorizing the governing body of every municipal corporation, other than cities of the first class, to fund or refund *any* indebtedness of the corporation by a vote of four-fifths of their number. That act authorized the issue of bonds, to be exchanged for any existing indebtedness, or to be sold for money to be applied to the payment of such indebtedness.

"It is contended that this act violates the provisions of the constitution against special legislation. But there can be no question that the act classifying municipal corporations is constitutional *(Pritchett vs. Stanislaus County*, 73 Cal., 310*)*, and that in matters pertaing to municipal organization the legislature may make different regulations for the different classes so created *(Pasadena vs. Stimson*, 91 Cal. 249*)*. The subject matter of the act in question—the funding of municipal indebtedness—is 'peculiarly a matter pertaining to municipal organizations, and still more peculiarly a matter as to which cities of large population require different provision from that suitable to cities or towns of small population.' The act is, therefore, not obnoxious to that objection. * * *

"On March 1, 1893, an act was passed (Stats. 1893, p. 59) amending the act of 1883. By this amendment a submission to the voters was required in all cases, one-fortieth (instead of one-twentieth) of the principal was required to be paid each year, and authority was given to make the bonds payable either at the office of the city treasurer, or at a bank in San Francisco, New York, Boston or Chicago.

"It is contended that this act also is invalid, as special legislation; but what we have said as to the act of 1883 on this question applies equally to this act. It is also claimed that the legislature could not authorize a debt payable in twenty years to be refunded into a debt payable in forty years; but we fail to discover any force in this contention, and no reason is suggested or authority referred to supporting it."

E.

Refunding Act is not unconstitutional as impairing the obligation of contracts.

The learned counsel for the city of Santa Cruz claimed in their brief in the Circuit Court of Appeals that the said refunding act of March 1, 1893, is invalid under the constitution of California, and also under the constitution of the United States, on the ground that it impairs the obligation of existing contracts—

to wit, the contracts contained in the outstanding bonds of municipalities. They claim that Section 2 of the said act provides for the refunding of such bonds before maturity, without the consent of the holders thereof, thus impairing the obligation of such contract. There are several obvious answers to any such objection to the constitutionality of said act.

The first and most obvious answer to this objection is that it has not been adjudged in the present case (or in any other, so far as we have been able to ascertain) that the said statute authorizes a municipality to compel the holders of bonds not yet matured to accept payment of the same before maturity. The statute does not so provide. Section 2 of the said statute can be read as authorizing the application of proceeds of the sales of refunding bonds to the payment of bonds which have matured, or will have matured by the time the proceeds of such sales have been received by the municipality. So read, the statute is not open to any objection on the ground suggested by the learned counsel for the city of Santa Cruz. In the present case there is no finding of fact which compelled the Circuit Court to give to this statute any other construction in order to render the judgment which was rendered in the present case. There is no finding of fact as to when the original bonds became due, which were refunded by the present issue of bonds, neither is there any finding of fact that the holders of the said original bonds, even if such bonds had not yet matured, were not willing and anxious to receive payment of the said original bonds.

Even if Part of Statute Attempted to Violate Rights of Holders of Old Bonds, They Alone Could Complain, and Not the City.

It is well-settled law that, in the absence of any such facts, or even if such facts existed, the city cannot raise any such defense as that Section 2 of the said Act of March 1, 1893, impairs the obligation of the contracts contained in the old bonds. If the rights of the holders of those old bonds had been violated, they alone could complain of it. The said refunding act, as actually construed in the present case upon the facts as shown in the record, involves no such question.

A case directly in point is *Provident Institution for Savings vs. Jersey City*, 133 U. S., 506. In that case the statute made water rates a charge upon lands in a municipality, with a lien prior to all encumbrances, in the same manner as taxes and assessments. The statute in terms applied to all mortgages, and made no express distinction or mention of mortgages made before, or mortgages made after, the passage of such statute. In the said case, before this Court on writ of error to the Court of Chancery of the State of New Jersey, it was urged that this statute violated the Fourteenth Amendment to the Constitution of the United States by depriving the mortgagee of his superior lien. The particular mortgage then before the Court, however, was a mortgage made *after* the passage of the said statute, and, therefore, this Court said (p. 514):

"What may be the effect of those statutes in this regard upon mortgages which were created prior to the

statute of 1852 it is unnecessary at present to inquire. The mortgages of the complainant were not created prior to that statute, but long subsequent thereto."

This Court therefore held that the Constitution of the United States had not, in the case before the Court, been violated by the enactment of the said statute, and that such statute was valid and enforceable as respects the mortgage involved in that case. The Court thus refused to pass upon any moot question not on the record in the case before it.

In the case of *Sweet vs. Rechel*, 159 U. S., 380, Mr. Justice HARLAN, giving the opinion of this Court, said (p. 392):

"In determining whether the Legislature in a particular enactment has passed the limits of its constitutional authority, every reasonable presumption must be indulged in favor of the validity of such enactment. It must be regarded as valid unless it can be clearly shown to be in conflict with the constitution. It is a well-settled rule of constitutional exposition that if a Statute may or may not be, according to circumstances, within the limits of legislative authority, the existence of the circumstances necessary to support it must be presumed (*Talbot vs. Hudson*, 16 Gray, 417, 422; *Fletcher vs. Peck*, 6 Cranch, 87, 128; *Sinking Fund Cases*, 99 U. S., 700, 718)."

Courts do not sit to hear moot questions as to the constitutionality of statutes any more than to consider any other moot questions. They deal only with actual cases which are before them, and with actual questions relating to the rights and interests of the parties actually arising in such cases on the record. No Court will listen to a discussion of the constitutionality of a statute in any actual case which is before it, unless in such case *the complaining party* has suffered under the statute in the particular respect in which he claims the

statute is unconstitutional. A complaining party is not allowed to set up in any case a moot question of what might be done (but has not been done) under the statute to affect his interests, or what has been done, or what might be done, to affect the interests *of third* persons not parties to the action or suit.

These principles were stated by Mr. Chief Justice SHAW in the case of *Wellington et al., petitioners, &c.* (16 Pick., 87):

"In considering the question, whether the act passed June 5, 1830, providing for the enclosure and appropriation of Cambridge common is a constitutional act, having the force and effect of law, the delicacy and importance of the subject may render it not improper to repeat what has been so often suggested by courts of justice, that when called upon to pronounce the invalidity of an act of legislation passed with all the forms and solemnities requisite to give it the force of law, courts will approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light on the subject, and never declare a statute void, unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt. Still, however, it cannot be doubted, and I believe it is nowhere denied, that in a limited government like ours, acting under a written constitution with numerous and detailed provisions, a constitution which is in itself perpetual and irrepealable except by the people themselves, and which imposes many restraints upon the power of the legislature by express provisions and many others by necessary implication, and where the same constitution has provided for the establishment of a judiciary as a co-ordinate department of the government, with power in all cases to expound the laws, to declare what has and what has not the force of law, and to apply them to the investigation and adjustment of the rights, duties and obligations of citizens, in the actual administration of justice, it is clearly within the power, and sometimes the imperative duty of courts, to declare that a particular enactment is not warranted by the power vested in the legislature, and therefore to the

extent, to which it thus exceeds the power of the legislature, it is without efficacy, inoperative and void. Perhaps, however, it may be well doubted, whether a formal act of legislation can ever with strict legal propriety be said to be void ; it seems more consistent with the nature of the subject, and the principles applicable to analogous cases, to treat it as voidable. But whether or not a case can be imagined, in which an act of the legislature can be deemed absolutely void, we think it quite clear, that when such act is alleged to be void, on the ground that it exceeds the just limits of legislative power, and thus injuriously affects the rights of others, it is to be deemed void only in respect to those particulars, and as against those persons, whose rights are thus affected. *Prima facie*, and upon the face of an act itself, nothing will generally appear to show that the act is not valid ; and it is only when some person attempts to resist its operation and calls in the aid of the judicial power, to pronounce it void, as to him, his property, or his rights, that the objection of unconstitutionality can be presented and sustained. Respect for the legislature, therefore, concurs with well-established principles of law, in the conclusion, that such an act is not void, but voidable only ; and it follows as a necessary legal inference from this position, that this ground of avoidance can be taken advantage of by those only who have a right to question the validity of the act, and not by strangers. To this extent only is it necessary to go, in order to secure and protect the rights of all persons against the unwarranted exercise of legislative power, and to this extent only, therefore, are courts of justice called on to interpose.

" Besides, and this is another argument leading to the same result, if a legislative act may or may not be valid according to circumstances, courts are bound by the plainest principles of exposition, as well as by a just deference to the legislature, to presume the existence of those circumstances which will support it and give it validity. For instance, if an act of the legislature appears on the face of it to be an encroachment on the rights of any persons, but would nevertheless be valid if passed with the consent of those persons, the court is bound to presume that such consent was given. And this presumption must prevail in favor of the validity of the act, until the contrary is shown, and shown too by a person having an interest in the main-

tenance of the rights supposed to be thus injuriously affected, and having the right to call for the interposition of the court for their support and protection, and a stranger can have no right to appear and contest the validity of the act upon such a ground."

The same principle is stated by Judge COOLEY, *Principles of Constitutional Law*, 2d ed., 152-3:

"4. The court will not listen to an objection made to the constitutionality of an Act by one whose rights are not affected by it, and who consequently can have no interest in defeating it. *For example, one who has received compensation for property appropriated by statute to a public use will not be suffered afterwards to dispute the constitutional validity of the statute.* The statute is assumed to be valid until some one complains of it whose rights it invades. The power of the court can be invoked only when it is found necessary to secure and protect a party before it against an unwarranted exercise of legislative power to his prejudice."

The same principle was involved in the case of *Paulsen vs. Portland*, 149 U. S., 30, where Mr. Justice BREWER, giving the opinion of the court, says (p. 42):

"Without continuing this inquiry any further, we are of the opinion that, notwithstanding the doubt arising for the lack of express provision for notice in ordinance 5068, it can not be held, *in view of the notice which was given*, of the construction placed upon this ordinance by the council thereafter, and of the approval by the Supreme Court of the proceedings as in conformity to the laws of the State, that the provisions of the federal Constitution, requiring due process of law, have been violated."

So also it has been frequently held by this court on writ of error that the right or title claimed must be claimed by the plaintiff in error for himself and not for a third person.

Henderson vs. Tennessee, 10 Howard, 311.
Owings vs. Norwood's Lessee, 5 Cranch, 344.

Verden vs. Coleman, 1 Black, 472.
Long vs. Converse, 91 U. S., 105.
Miller vs. National Bank of Lancaster, 106 U. S., 542.
Manning vs. French, 133 U. S., 186.
Giles vs. Little, 134 U. S., 645.
McNulta vs. Lockridge, 141 U. S., 327.
Ludeling vs. Chaffee, 143 U. S., 301.
Brown vs. Smart, 145 U. S., 454.
Texas & P. R. Co. vs. Johnson, 151 U. S., 81.

See, also, *Loeb vs. Columbia Township Trustees*, 179 U. S., 472, 490, quoted on this brief, p. 146; and *Lampasas vs. Bell*, 180 U. S., 276 (1901), quoted on this Brief, p. 173.

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Furthermore, the said Section 2 of the refunding act of March 1, 1893, could be wholly stricken out of the said statute, and there would be left ample power to issue the bonds now in question, and to levy taxes for the payment of the principal and interest of such bonds. This said Section 2 is wholly separable from the said Section 1, and the power contained in the said Section 1 is not made conditional upon, or dependent in any way upon the provisions of said Section 2.

The language of this Court in *Loeb vs. Columbia Township Trustees*, 179 U.S., 472, is pertinent. Mr. Justice HARLAN, giving the opinion of the court, says (p. 488):

"Now let it be supposed that the third section of the special act in question prescribed a rule by which all inquiry is precluded in respect of special benefits accruing to the adjoining property owners, and that an assessment under that section would be invalid under the decision in *Norwood vs. Baker*, as taking private property for public use without just compensation—upon which question we express no opinion—would it follow that the township would escape liability on the

bonds? We think not. The fourth section of the act, authorizing and *directing* bonds to be issued for the purpose of raising the money necessary to meet the expenses of the improvement in question, may stand with sections one and two, even if section three were held to be void as prescribing an illegal mode of assessment. The power to issue bonds to raise the money, and the mode in which the township should raise the necessary sums to pay the bonds when due as well as the interest accruing thereon from time to time, are distinct and separable matters."

Mr. Justice HARLAN refers to the fact also (p. 489) that

"There is some ground for saying that the legislature would not have passed the act without the third section; and that was the view expressed by the learned judge who tried the case below. But we do not think that such is so manifestly the case as to justify the courts in refusing to execute the valid parts of the statute when that can be done in harmony with the intention of the legislature to have the improvement in question made by the township and its cost met by issuing bonds."

So in the present case there is no ground to suppose that the legislature of California would have failed or declined to pass Section 1 of the said refunding act of March 1, 1893, except on the condition of accompanying such section by some provision which would compel the holders of old bonds not yet matured to accept payment thereof before maturity. As we have already stated, there is no ground to suppose that any part of the said refunding act of March 1, 1893, was intended to compel the holders of any old bonds to accept payment of the same before maturity; but if Section 2 of the said act of March 1, 1893, on any theory could have any such meaning attached to it as claimed by the learned counsel for the city of Santa Cruz, still it cannot be supposed that the legislature of California

would have declined to enact Section 1 of the said act authorizing the issue of refunding bonds, for the purpose of refunding such indebtedness as had matured or was about to mature. Certainly the enactment of such a refunding statute for such a purpose would be proper and desirable, and not open to any objection. Section 1, therefore, of the said refunding act of March 1, 1893, could stand alone as sufficient authority for the issuance of the refunding bonds now in question.

The objection of the learned counsel for the city is based upon the idea that the City of Santa Cruz has undertaken to compel the holders of old bonds to take payment of their bonds before they become due. If this were the fact, then the holders of the old bonds might, when their bonds became due, bring an action upon their bonds, and endeavor to obtain a judgment thereon, and in such case the question could be raised whether the City of Santa Cruz could compel the holders of those old bonds to accept payment of the same.

See on this point the cases *supra* (p. 149, *et seq*).

No such question, however, arises on the record in the present case. There is no proof nor any finding of fact that the City of Santa Cruz has attempted, or is attempting, to compel any holder of old bonds to take payment for the same before their maturity; and, even if there were any such finding of facts, that would concern only the holders of such old bonds, and they alone could raise any question that the obligations of those old bonds were being impaired contrary to the Constitution of California and of the United States. The City of Santa Cruz cannot raise any such question; and, even if it could, there are no findings of fact in the present case on which to base any such legal

proposition. For all that appears in the findings of the court in the present case, the holders of the old bonds to be refunded were perfectly willing, and even anxious, that their bonds should be paid off before their maturity, and they were the only ones whose constitutional rights would have been violated, even according to the proposition of the learned counsel for the City of Santa Cruz.

Furthermore, it does not appear in the findings of the court when the said old bonds would mature, and, therefore, there is no basis of fact whatever upon which to build any such argument on behalf of the holders of those bonds as the learned counsel for the defendant have attempted to build.

Recitals in Bonds estop City from making any such Defense.

All of this defense as to the old bonds being not yet due is wholly immaterial as respects the *bona fide* holder of the refunding bonds and the coupons now in question. These bonds recite that they are issued "for the purpose of refunding the bonded indebtedness of said city, and issuing bonds therefor, and providing for the payment of the same," &c., and on no theory could such a defense be set up against the *bona fide* holders of these refunding bonds, as that the original bonds to be refunded were not due, even if it were good as against a holder of these bonds who had notice. But, as we have already seen, no facts were proved and no findings of fact were made in the present case which would make out such a defense as against any one.

F.

Bonds in question are not invalid because they contain a clause pledging the faith and credit and all the real and personal property of the city for the payment thereof.

The learned counsel for the City of Santa Cruz undertake to make an argument that because the bonds in question in the present case contained the following clause (Record, p. 5), to wit:

"And for the payment of the principal sum herein named, and the interest accruing thereon, the said City of Santa Cruz is held and firmly bound, and its faith and credit, and all the real and personal property of said city, are hereby pledged for the prompt payment of this bond and interest at maturity,"—

that, therefore, the said bonds are void. The ground of objection of the learned counsel for the city is that this clause contains the following:

"The real and personal property of said city, are hereby pledged for the prompt payment of this bond and interest at maturity."

They contend that there is no authority to pledge the real and personal property of the city for the payment of the bond. The learned counsel cite Article XI., Section 15, of the Constitution of California:

"Sec. 15. Private property shall not be taken or sold for the payment of the corporate debt of any political or municipal corporation."

Obviously this clause was inserted in the bond, not with a view of attempting to make literally any pledge of the real and personal property belonging as private

property to the inhabitants of the City of Santa Cruz, but was intended as a general statement that the holder of the bond might look to all the real and personal property of said city as liable to taxes to pay the bond and interest thereon. These words could not be taken literally, and could not have been intended to be taken literally for several reasons:

1. Such a view would mean that all the real and personal property of said city—not the private property of inhabitants of said city, but the real and personal property of the corporation itself—are hereby pledged. This, apparently, however, is not what was intended, but if it was intended, then it would not be open to objection on any ground urged by the learned counsel for the City of Santa Cruz.

2. Another objection to taking these words literally is that a pledge of property necessarily implies a change of possession, and that is characteristic of a pledge as distinguished from a mortgage or lien, and obviously this clause in the bond did not make any change of possession of the real and personal property of said city as a corporation, or the private property of the inhabitants thereof.

3. These words must be read with the other words in the sentence in order that they may be understood. So read, they do not mean a literal and technical pledge. The full clause reads as follows:

"And its faith and credit, and all the real and personal property of said city, are hereby pledged for the prompt payment of this bond and interest at maturity."

When this clause says that the "faith and credit" of the city are pledged, it does not mean a "pledge" in any literal sense. That would be absurd. The

language is figurative. So, also, when the other words are added:

"And all the real and personal property of said city are hereby pledged."

The clause means that they are pledged not literally and technically, but in the sense that they are to be resorted to by means of taxation, as provided by law, to enable the city to make payment of the bond. Thus understood, the words are appropriate, and are not open to any objection such as was urged by the learned counsel for the defendant in error.

But even supposing that an attempt were made to take these words literally, and even supposing they would then be invalid, then these words would be only surplusage, which could be stricken out of the bond without in any way impairing its validity.

Clauses of this kind have been frequently inserted, as, for example, in the bonds in the following cases, which bonds were held good by the Supreme Court of the United States, to wit:

Humboldt Township vs. Long, 92 U. S., 642.
Pana vs. Bowler, 107 U. S., 534.
Oregon vs. Jennings, 119 U. S., 76.
Evansville vs. Dennett, 161 U. S., 437.

Any such defense could not be raised by the city, but only by a property owner, and then only when it was proposed to enforce any alleged pledge of his property.

Furthermore, even if an attempt were made to take these words literally, they would not constitute any defense to this action on these bonds and coupons, but the question which is raised by the learned counsel for the

defendant in error could only be raised by some owner of real and personal property in the City of Santa Cruz, whose property was to be taken under and by virtue of the alleged pledge. In any such case the holder of such real and personal property might make such question, and have the matter determined. The City of Santa Cruz, however, cannot set up the rights of any such property owner as a defense to its personal obligation on these bonds. It will be time enough to raise any such question when the holder of these bonds undertakes to enforce any such alleged pledge against any such holder of real and personal property in the said city.

As was said by Mr. Justice HARLAN in *Loeb vs. Columbia Township Trustees*, 179 U. S., 472 (p. 490):

"The relief asked and the only relief that could be granted in the present action, is a judgment for money. If the township should refuse to satisfy a judgment rendered against it, and if appropriate proceedings are then instituted to compel it to make an assessment to raise money sufficient to pay the bonds, the question will then arise whether the mode prescribed by the third section of the act of 1893 can be legally pursued."

So in the present case the only relief demanded is a "judgment for money." If the City of Santa Cruz should then refuse to pay the judgment, and if any holder of such judgment should then undertake to enforce any alleged pledge upon the real and personal property of the City of Santa Cruz, the question would then arise whether such pledge was valid, but the question would not arise until some action was taken to enforce such alleged pledge. No such question arises in the present case.

Another case directly in point is the very recent one of *Lampasas vs. Bell*, 180 U. S., 276 (February 11, 1901). That was an action at law on certain interest coupons of Lampasas City Water Works bonds, issued by the city while acting under the provisions of Title XVII. of the Revised Statutes of Taxes of 1879, relating to the formation of municipal corporations. A defense urged by the city was (p. 282) that said Title XVII. was

"in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States, in that the boundaries of such corporations were not fixed by the legislature, nor do said statutes make any provisions by which said boundaries can be fixed by any tribunal or official before whom the residents of the territory proposed to be incorporated could be heard as to whether they should be included in or made subject to taxation in the proposed corporation."

The claim of the city was that because of such alleged unconstitutionality of said Title XVII. the taxpayers would be deprived of their property without due process of law, if the bonds were held valid. On this point Mr. Justice McKenna, giving the opinion of the Court said (p. 283):

"But what concern is it of the plaintiff in error [the City of Lampasas] whether the residents of such territory were or were not given an opportunity to be heard? It had no proprietary right or interest in 'territory proposed to be incorporated'; *it* was put to no hazard of taxation without a hearing, nor can it stand in judgment for those who had such interest or were put to such hazard. It was certainly the right of the residents of the territory to submit to incorporation and accept its burdens and its benefits. And the record shows that there was no question of its validity for six years. When questioned it was not on the ground that it was incorporated under an unconstitutional statute—not on the ground that it was imposed without a hearing on unwilling subjects—but on the

ground that the prior incorporation of 1873 had not ceased to exist.

"We said in *Clark* v. *Kansas City*, 176 U. S. 114 (quoting from Cooley's Constitutional Limitations, section 196), that 'a court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest in defeating it.' That is, a legal interest in defeating it. The objection of unconstitutionality of a statute must be made by one having the right to make it, not by a stranger to its grievance. 'To this extent only is it necessary to go, in order to secure and protect the rights of all persons, against the unwarranted exercise of legislative power, and to this extent only, therefore, are courts of justice called on to interpose.' *Wellington, Petitioner*, 16 Pick. 87, 96."

See, also, on this proposition the cases cited on this brief, pages 160–165.

G.

It is no objection to the issue of these bonds that they may extend the time of payment of the indebtednesss thereby refunded more than forty years from the time of contracting the original indebtedness.

The learned counsel for the City of Santa Cruz, in their brief in the United States Circuit Court of Appeals, urge that the refunding act of March 1, 1893, is unconstitutional, because it authorizes the issue of bonds payable more than forty years from the time of contracting indebtedness sought to be refunded, contrary to the provisions of Section 18 of Article XI. of the constitution of California.

Precisely the same objection was made in respect of the funding bonds in question in the case of *City of Los Angeles vs. Teed*, 112 Cal., 319. The argument of

"FRANCIS J. THOMAS, *amicus curiæ*, for respondent," was as follows (p. 322):

"The refunding of the liabilities, and postponing the date of payment to May 1, 1935, which would exceed forty years from the time of contracting the same, is contrary to both the original and amended provision of the constitution (Const., art. XI., sec. 18; Stats. 1891, p. 523)."

The argument, of course, under this section of the constitution, is that as a tax is required to be levied to pay the interest and to constitute a sinking fund to pay the principal within twenty years, or, as amended in 1892, within forty years, from the date of contracting the indebtedness; therefore, the indebtedness must be paid and not refunded. Of course, the answer to any such argument is that the constitution does not anywhere, either expressly or by necessary implication, prohibit the refunding of any such indebtedness, and the general legislative power of the legislature is not to be limited, except by express provision of the constitution or by necessary implication.

On this point the court, in its opinion in *City of Los Angeles vs. Teed*, said (p. 329):

"It is also claimed that the legislature could not authorize a debt payable in twenty years to be refunded into a debt payable in forty years; but we fail to discover any force in this contention, and no reason is suggested or authority referred to supporting it."

The same question came before the Supreme Court of Illinois in the case of *Kane vs. City of Charleston*, 161 Ill., 179. The constitution of the State of Illinois requires the levying of a tax to pay the indebtedness within twenty years from the time of contracting the same. The question arose whether such indebtedness could be refunded, and the Supreme

Court of Illinois, after full consideration, decided that such indebtedness could be refunded, as there was no prohibition in the constitution.

H.

The bonds and coupons in question are not unauthorized or illegal because made payable in "gold coin of the United States."

The Act of March 1, 1893 (Session Laws of California, 1893, p. 59), under which these bonds were issued, provides:

"Said bonds may be issued in denominations not to exceed one thousand dollars, nor less than one hundred dollars, principal and interest being payable in *gold coin or* lawful money of the United States," etc.

Ordinance No. 314, calling the election, provides (Additional Finding No. 1, Record, p. 26) as follows (Record, p. 28):

"They [the bonds] * * * shall be payable, principal and interest, in gold coin of the United States."

The form of bond set forth in the said ordinance was made payable in (Record, p. 29) "gold coin of the United States."

The notice of election (Additional Finding No. 2, Record, p. 32) also stated (Record, p. 35):

"They [the bonds] shall be payable, principal and interest, in gold coin of the United States."

The vote of the electors of Santa Cruz was, therefore, in favor of the issuance of bonds payable in "gold coin of the United States." It is settled by the ex-

press decision of the Supreme Court of California that in such a case the bonds may be issued payable in gold coin of the United States. *Murphy vs. City of San Luis Obispo*, 119 Cal., 624, citing and distinguishing *Skinner vs. Santa Rosa*, 107 Cal., 465, in which latter case the vote of the people was for bonds "payable in gold coin or lawful money of the United States," and in which latter case also the Supreme Court of California held that the officers of Santa Rosa had no right to change the medium of payment of the bonds and make them payable in gold coin alone, after such vote of the people. But where the people voted for a bond payable in gold coin of the United States alone, such bonds were legal under a statute which provided that bonds should be made payable in gold coin or lawful money, and such was the decision of the Supreme Court of California in *Murphy vs. City of San Luis Obispo*, 119 Cal., 624.

There is, therefore, nothing in the objection raised by the defendant in error, that the bonds now in question are invalid because made payable in gold. On the contrary, this very point has been expressly passed upon by the Supreme Court of California, in *Murphy vs. City of San Luis Obispo*, and the bonds held valid in this very respect.

See, also, *Woodruff vs. Mississippi*, 162 U. S., 291.

I.

The learned counsel for the City of Santa Cruz undertook to make a point that the old bonds refunded by the present issue of bonds were invalid, because they were is-

sued after the act of March 15, 1887, had been repealed.

On this point it is sufficient to say that there is no such finding of fact by the court. But even if there were such a finding of fact, this would be immaterial, because there is no finding of fact that any holder of the present refunding bonds had any notice as to the time when said old bonds were issued, and the recital in the present bonds that they were issued to fund bonded indebtedness of the City of Santa Cruz is conclusive in favor of the *bona fide* holders of the present bonds that the old bonded indebtedness was valid (see on this point cases cited on this brief, pp. 40–49).

J.

Municipal bonds are negotiable instruments in California.

The California Negotiable Instruments Law contained in the Civil Code of that state expressly provides as follows (Deering's Annotated Codes, 1885).

"SECTION 3087. A negotiable instrument is a written promise or request for the payment of a certain sum of money to order or bearer."

"SECTION 3095. There are six classes of negotiable instruments, viz :

"1. Bills of exchange.
"2. Promissory notes.
"3. Bank notes.
"4. Checks.
"5. Bonds.
"6. Certificates of deposit."

Thus, the Civil Code of California in force when the bonds now in question were issued expressly provides that "bonds" are "negotiable instruments."

The refunding bond act of March 1, 1893 (Session Laws of California, 1893, p. 59), expressly authorizes cities to issue "bonds;" that is, *negotiable* bonds.

It is perfectly clear, therefore, that under express provisions of the statutes of California the municipal bonds now in question are negotiable instruments. There is no exception in the California negotiable instrument law such as that municipal bonds shall not be negotiable. Such an exception is contained in a negotiable instrument law enacted by one of the states—to wit, Wisconsin—the statute of which enacts that bonds of municipalities shall not be negotiable unless the statute authorizing them expressly so provides (Session Laws of Wisconsin, 1899, p. 683), but no such exception appears anywhere in the statutes of California. The reasons why no such exception is made by States generally are well stated by Mr. Justice HARLAN in the case of *Gunnison County Commissioners vs. Rollins*, 173 U. S., 255, as follows (p. 276):

"Indeed, it is entirely competent for a State to provide by statute that all obligations, in whatever form executed by a municipality existing under its laws, shall be subject to any defense that would be allowed in cases of non-negotiable instruments. But for reasons that everyone understands no such statutes have been passed. Municipal obligations executed under such a statute could not be readily disposed of to those who invest in such securities."

Furthermore, the Supreme Court of California has, in numerous cases, expressly decided this very question. In the case of *Derby vs. The City of Modesto*, 104 Cal., 515, the validity of certain bonds of the City of Modesto was directly in issue. The Court says (p. 517):

"The bid of the Oakland Bank of Savings for the purchase of said bonds was accepted January 19, 1893, and the full purchase price thereof was by said bank paid into the city treasury, and the notice and protest of appellant was not served until March 15, 1894, the first installment of the principal and the interest having been paid by the city in the preceding December. Nor is it asserted by appellant in its said notice, nor does it appear from the statement, that the purchaser of the said bonds had any notice of the alleged defects in the proceedings upon which the issue of said bonds was based.

'The following doctrines are too well settled to be any longer open to question. A *bona fide* purchaser of negotiable paper for value, before maturity, takes it freed from all infirmities in its origin, unless it is absolutely void for want of power in the maker to issue it, or its circulation is by law prohibited. Municipal bonds payable to bearer are subject to the same rules as other negotiable paper'. (Dillon on Municipal Corporations, 4th ed,, sec. 513, and cases cited in notes.)

The same learned author in succeeding sections, referring to the course of decisions in the supreme court of the United States, says: 'It has rejected, when necessary to protect the *bona fide* holders of such securities, narrow and rigid constructions of statutes authorizing the creation of such debts. Against such holders it has given no favor for defenses based upon mere irregularities in the issue of the bonds or upon noncompliance with preliminary requirements, not going to the question of *power* to issue them.' (Dillon on Municipal Corporations, sec. 515. See, also, *St. Joseph Township* v. *Rogers*, 16 Wall. 644.)

In the light of the principles enunciated by the foregoing authorities we will now notice the particular defects in the proceedings leading up to the issue of the bonds in the order in which they are stated by counsel for appellant."

The Court, therefore, held the bonds valid in the hands of the *bona fide* purchaser thereof, against all the objections raised concerning the said bonds.

The case of *Meyer vs. Brown*, 65 Cal., 583 (1884), is an authority directly in point, and especially pertinent

here, because the bonds in question in that case were refunding bonds, as are the bonds in question in the present case. The facts are sufficiently stated in the opinion of the court on motion for a new trial, as follows—to wit (p. 589):

"THE COURT: This is a motion for a new trial. At the trial before the referee **defendants offered to prove facts, which, it is claimed, would have shown that certain of the bonds described in the complaint herein, the payment of which is sought to be enforced by the mandate of this court, were issued in consideration of the surrender of bonds, purporting to represent indebtedness of the city of Sacramento, which bonds (last named) had been illegally issued, and did not constitute valid claims against the said city.**

"It is contended by the defendants that the referee erred in rejecting the evidence offered.

"We deem it unnecessary to enquire whether, assuming the facts to be implied by the defendants' offer of evidence, the bonds, in lieu of which the bonds in suit were issued, were invalid. True, the Act of 1858 (Stats. 1858, p. 280) provided that all 'legal' claims might be funded, but, as we understand the provisions of that act, the president of the board of supervisors, the clerk of the board, and the treasurer were authorized to determine, on behalf of the city and county of Sacramento, the legality of each claim presented, and, if satisfied of its legality, to issue a bond or bonds therefor. Even if the evidence offered would have shown that the officers mentioned violated their duty by deciding some claims to be legal which they knew were illegal, there was no offer to prove that the claims, alleged to be the consideration for the bonds sought to be enforced by this proceeding, were presented by plaintiff, or that any of such bonds issued to him. There is no averment in the answer, nor is there any finding in the record, or any evidence tending to prove, that plaintiff is other than a holder *bona fide* of the bonds. The bonds recite that they were issued in accordance with the law of 1858; they and the coupons attached are signed and authenticated as required by

that law. They are exactly such bonds as would have been authorized had the officers of the city and county indisputably allowed only 'legal debts and liabilities' of the former corporation—the city of Sacramento. At the trial, the *bona fides* of the plaintiff being conceded, there was but one question to be decided—to wit, Were the bonds such as the city and county had power to issue? No question of irregularity, or even fraud, on the part of the agents of the municipality, could be considered" (*Roneden vs. Jersey City*, 17 Rep., 253; *East Lincoln vs. Davenport*, 94 U. S., 801; *Pompton vs. Cooper Union*, 101 U. S., 196; *Sherman vs. Simmons*, 109 U. S., 737; *Louisiana vs. Pilsbury*, 105 U. S., 278).

Note the language of the court:

"The *bona fides* of the plaintiff being conceded, there was but one question to be decided—to wit, Were the bonds such as the city and county had power to issue? No question of irregularity, or even fraud, on the part of the agents of the municipality, could be considered."

Note also that in the case of *Meyer vs. Brown*, *supra*, the defendant offered evidence to show, as against a *bona fide* holder, that the old bonds refunded by the bonds then in question had been illegally issued, and did not constitute valid claims against the city, and the court held that the referee did not err in rejecting such evidence.

The Nevada Bank vs. Steinmitz, 64 Cal., 301 (1882), is also a case in point. In that case certain railroad aid bonds issued by Santa Cruz County, California, were sued upon. The following extract from the opinion given by MORRISON, C. J., is pertinent (p. 314):

"The Bank of Nevada purchased the bonds for value, without notice of any infirmity in them, and the only question is one of *power* in the board to issue them. (*Cromwell* v. *The County of Sac*, 96 U. S. 51;

1 Dillon Mun. Corp. § 515, and authorities there cited.) If the board did not have the *power* to issue the bonds there could be no such thing as a *bona fide* holder of them, as any purchaser would be held to have notice of the fact, where there was a total want of authority. (*Township of East Oakland* v. *Skinner*, 94 U. S. 258.) 'The following doctrines are too well settled to be any longer open to question. A *bona fide* purchaser of negotiable paper for value before maturity takes it freed from all infirmities in its origin, unless it is absolutely void for want of power in the maker to issue it, or its circulation is by law prohibited. Municipal bonds payable to bearer are subject to the same rules as other negotiable paper.' (1 Dillon on Mun. Corp. § 113, and authorities there cited.) Speaking further on this subject, the same author says: 'The Supreme Court of the United States has upheld the rights of the holders of municipal securities with a strong hand, and has set a face of flint agains repudiation.' (1 Dillon on Mun. Corp. § 518.) 'It [the Supreme Court of the United States] has adopted when necessary to protect the *bona fide* holders of such securities, liberal construction of statutes and charters authorizing the creation of such debts. Against such holders it has given no favor to defenses based upon mere irregularities in the issue of the bonds or non-compliance with preliminary requirements, not going to the question of power to issue them.' (1 Dillon on Mun. Corp. § 515.)"

The court thus held that the county bonds there in question were negotiable, and were valid, and enforced their payment.

See, also, quoted on this brief, p. 68, the case of *State of California vs. Wells, Fargo & Company*, 15 Cal., 336 (1860), in which the Supreme Court of California expressly held that refunding bonds issued by the State were negotiable instruments, and that the defense was not open to the State, that the warrants funded by such bonds had been stolen from the treasury of the State after they had already been paid and canceled.

The learned counsel for the city of Santa Cruz cited on their brief in the United States Circuit Court of Appeals in the present case certain decisions of the Supreme Court of California, under which they claim that municipal bonds are not negotiable. But those cases do not sustain any such claim.

Sutro vs. Dunn, 74 Cal., 593, cited by the counsel for the defendant The City of Santa Cruz in their brief in the United States Circuit Court of Appeals as sustaining the proposition that bonds are not negotiable in California, does not support that proposition. The head-note of the case states accurately the point therein involved, as follows:

"A *bona fide* purchaser of bonds issued by the state of California for the loss of property incurred during the suppression of Indian hostilities, which bonds recite their issue in conformity with the act of April 25, 1857, and which are made payable only out of money thereafter to be appropriated by Congress for the payment of such expenses, is charged with notice of all the conditions imposed by the acts of the legislature and of Congress upon the subject of the act of April 25, 1857, and *cannot enforce the payment of the bonds until an appropriation therefor has been made by Congress.*"

The bonds there in question were payable only out of money thereafter to be appropriated by Congress, and the Court of course held that the plaintiff could not obtain a mandamus compelling Dunn, the State Comptroller, to draw a warrant to pay the bonds until a fund for the payment thereof had been created by Congress. That was all there was in the case. It did not involve or decide any such proposition as that municipal bonds are not negotiable in California.

In *Sutro vs. Pettit*, 74 Cal., 332, and in *Sutro vs. Rhodes*, 92 Cal., 117, the bonds there in question were

held invalid because issued beyond the amount expressly limited by statute. There was no recital in the bonds, and the Court, in *Sutro vs. Pettit* (which the case of *Sutro vs. Rhodes* merely follows), expressly distinguished the case from that where recitals are contained in bonds, saying, with regard to recitals (p. 336):

"No such question arises in the case at bar."

The case of *McCoy vs. Briant*, 53 Cal., 247 (1878), involved the validity of certain alleged bonds of the city of San Diego. The history of those bonds is more fully given in *Lehman vs. City of San Diego*, 83 Federal Reporter, 669. Those bonds were originally *issued without any statute authority therefor.* After they were issued the legislature passed an act validating certain ordinances of the city, which authorized the issue of the bonds. Certain of those bonds were not issued according to said ordinances, and the court held that those particular bonds were not validated. That case depended entirely on the particular facts, and is not at all an authority for the proposition that municipal bonds in California are not negotiable.

Zottman vs. San Francisco, 20 Cal., 102, and *Murphy vs. Napa County*, 20 Cal., 503, cited by counsel for defendant the City of Santa Cruz in the Circuit Court of Appeals did not involve bonds at all, but were suits by contractors for public works. *French vs. Teschemacher*, 24 Cal., 550; *Herzo vs. San Francisco*, 33 Cal., 145, and *People vs. Tomlinson*, 35 Cal., 507, also cited by counsel for defendant, did not involve bonds. The last-named case was one of an indictment for forgery of contract, but no note or bonds was forged or in any way involved.

It is unnecessary to pursue the subject further. The claim of counsel for the defendant the city of Santa Cruz that municipal bonds are not negotiable in California is utterly without foundation.

K.

William T. Jeter was the mayor, de jure, or at least de facto, and J. F. Hoffmann, E. G. Green and F. W. Lucas were members of the common council, de jure, or at least de facto, of the said city of Santa Cruz when the bonds in question were signed and ordered delivered and delivered to Messrs. Coffin & Stanton. The decision of the Circuit Court holding their acts as such officers valid was correct; and the objections of the Defendant are without foundation.

The findings by the court on this point are as follows (Finding of Fact, No. 9, Record, p. 22, and Finding of Fact, No. 13, Record, p. 24):

"9. On April 11, 1892, Wm. T. Jeter was duly elected mayor of the defendant City of Santa Cruz, and J. Howard Bailey, J. F. Hoffmann, E. G. Green and F. W. Lucas were, on the same day, duly elected members of the common council of said city, and the said persons so elected as mayor and members of the common council duly qualified for their respective offices within ten days after their said election, and duly entered upon the duties of their respective offices. Section 3 of an act of the legislature of the State of California, entitled 'An act to reincorporate the city of Santa Cruz,' approved March 11, 1876, provides that the mayor and common council of said city shall hold their offices for a term of two years, and until their successors are duly elected and qualified. On the ninth day of April, 1894, Robert Effey was duly elected as

mayor of said defendant city to succeed William T. Jeter, and duly qualified as such between the hours of eleven o'clock a. m. and two o'clock p. m. of April 16, 1894; and Messrs. Henry G. Ensell, John Howard Bailey, J. D. Maher, and Frank K. Roberts, were on April 9, 1894, duly elected members of the common council of said defendant city, and all of them duly qualified as such councilmen before the meeting of the common council of said city defendant held April 16, 1894. The persons so elected mayor and members of the common council on April 9, 1894, with the exception of J. Howard Bailey, who was re-elected councilman, did not actually enter upon their duties as such officers until May 7, 1894, and the said Wm. T. Jeter, J. Howard Bailey, J. F. Hoffmann, E. G. Green, and F. W. Lucas continued to act publicly as mayor and members of the common council of said defendant city until May 7, 1894, without protest from any person, and held seven meetings of said council between and including the date of April 16, 1894, and May 7, 1894."

"13. That all of the bonds and coupons sued on were in the form alleged and set out in the complaint, and bore date and were signed and attested in the form and upon the date and by the persons alleged in the complaint, but some of said bonds were signed by Wm. T. Jeter on April 16, 1894, after the qualification of his successor in the office of mayor."

The court also found, as a "conclusion of law" (Record, p. 25):

"That Wm. T. Jeter was the *de facto* mayor of the defendant City of Santa Cruz on the sixteenth day of April, 1894, and so continued to be until May 7, 1894; and that he and the persons who assumed to act as members of the common council of defendant on the sixteenth and twenty-third days of April, 1894, to wit, J. F. Hoffmann, E. G. Green and F. W. Lucas were on those days the *de facto* mayor and the *de facto* members of the common council of the defendant city; and J. F. Bailey, who also acted as a member of its common council on said days, was a *de jure* member of such common council, and that the bonds and coupons sued on are upon their face valid obligations of the defendant."

For the opinion of the Circuit Court on this point see Record, page 48.

William T. Jeter was mayor de jure and J. F. Hoffmann, E. G. Green and F. W. Lucas were members de jure of the common council of the city of Santa when the bonds in question were signed and ordered delivered and delivered to Messrs. Coffin & Stanton.

The old charter of the city of Santa Cruz, entitled "An Act to incorporate the Town of Santa Cruz," approved March 31, 1866 (Session Laws of California, 1865–6, p. 547), provided, among other things, as follows:

"SEC. 2. The corporate powers and duties of said body corporate shall be vested in a Board of Trustees, to consist of three members, who shall be elected by the qualified electors of said town on the *first Monday of May* of each year, and shall hold their offices for the term of one year, and until their successors are chosen and qualified; *provided*, that the first Board of Trustees shall be chosen in like manner at some time and place to be designated by the Board of Supervisors of the County of Santa Cruz, which time shall not exceed twenty days from the date of said order, and the Trustees so chosen shall hold their offices until the first Monday of May next ensuing, and until their successors are elected and qualified."

It appears from the legislation regarding the city that for ten years, to wit, from the time of the adoption of the said charter of 1866 to the time of the adoption of the new charter in 1876, the elections in the town of Santa Cruz were held on the first Monday of May, and the officers came into office on that date.

The new charter, entitled "An Act to reincorporate the City of Santa Cruz," approved March 11, 1876 (Session Laws of California, 1875–6, p. 189), provided, among other things, as follows :

"SEC. 3. On the second Monday in April, A. D. one thousand eight hundred and seventy-six, and biennially thereafter on the second Monday of April, a charter election shall be held, at which the legally qualified voters of said city shall elect the several respective officers as hereinafter provided, viz.: a Mayor and four Councilmen—one from each ward, who shall be electors of the wards from which they are chosen, which Mayor and Common Councilmen shall hold their office for two years, and until their successors are duly elected and qualified. There shall be elected at the charter election, held on the second Monday in April, A.D. one thousand eight hundred and seventy-six, a City Assessor, who shall be City Clerk, and a City Treasurer, who shall be City Collector, who shall hold their office for two years, and until their successors are elected and qualified, who shall be elected biennially thereafter. The officers of the present town government, shall continue in office, under this charter, with such powers and duties as are herein prescribed, until their successors are elected and qualified; and nothing herein contained shall be construed to release any person holding office in said town, from any personal liabilities which they may have incurred by any of their official acts."

Section 7 of the said charter provides, among other things :

"The Mayor and Common Council shall hold their regular meetings on the first Monday in each month."

The first Monday of May, 1894, was May 7, 1894, the date when the newly-elected officers actually entered upon the duties of their office (Findings of Fact numbered 9, Record, p. 22).

It further appears in the record in this case, by stipulation of the parties (Record, pp. 60 61), that W.

T. Jeter, as mayor, and J. F. Hoffmann, E. G. Green and F. W. Lucas, as councilmen, entered upon the duties of their offices on the *first Monday of May*, 1892; to wit, on May 2, 1892. The entry on the books of the common council of the city is as follows (Record, p. 61):

"CITY OF SANTA CRUZ, May 2, 1892.

"The *Mayor and common council elect*, having qualified as required by law, were conducted to their seats by the *retiring board*.

"Roll-call—present: His Honor, W. T. Jeter, Mayor; councilmen, F. W. Lucas, J. H. Bailey, F. J. Hoffmann, E. G. Greene and the clerk.

Approved.

WM. T. JETER,
Mayor.

Attest:
C. L. LINCOLN [O. J. Lincoln]
City Clerk."

The minutes of the preceding meeting, April 13, 1892 (Record, p. 61), show that on that date G. Bowman was mayor, and Finkeldey, Young and Drullard were members of the council, so that it appears from these records that W. T. Jeter, as mayor, and J. F. Hoffmann, E. G. Green and F. W. Lucas, as members of the common council, entered upon the duties of their office on the first Monday of May, 1892, *and not before.*

Section 3 of the charter of the city of Santa Cruz, above quoted, expressly provides "*which mayor and common councilmen shall hold their office for two years.*" Two years from the first Monday of May, 1892—May 2, 1892—would be the first Monday of May, 1894—May 7, 1894—or would be at least as late as May 2, 1894. William T. Jeter, therefore, was mayor *de jure*, and J. F. Hoffmann, E. G. Green and F. W. Lucas were councilmen *de jure*, down to May 7, 1894, or at least to May 2, 1894.

But if William T. Jeter was not mayor de jure, of the city and J. F. Hoffmann, E. G. Green and F. W. Lucas were not members de jure of the common council, they were at the very least mayor of the city and members of the city council, respectively, de facto, as was held by the Circuit Court. And this proposition was not denied by the Circuit Court of Appeals in its opinion.

It appears, in what is above stated, that the newly-elected officers of the city of Santa Cruz, elected the second Monday of April, 1894, not only did not actually enter upon the duties of their office until the first Monday of May, 1894, to wit, May 7, 1894, but also that in so doing these officers followed the time-honored custom which had been pursued from the first incorporation of the city, and no doubt they supposed that they were acting not only according to such custom, but according to law. The old officers were, therefore, on any theory, *de facto* officers of the city of Santa Cruz until May 7, 1894, and they acted as such officers in good faith and according to the established custom, and in the belief that they were lawfully so acting. This, therefore, is emphatically a case where the rules as to the acts of *de facto* officers of a municipal corporation apply with full force. Moreover, it will be observed that the city charter of the city of Santa Cruz, approved March 11, 1876 (Session Laws of California, 1875-6, p. 189), Section 3 of which is above quoted, does not expressly provide any particular time at which the term of office of the officers of the city shall begin. The language of the said section is, "shall hold their office for two

years," without saying two years from what time. It seems a very natural construction that, when this new charter was granted and this provision was made that the officers should hold their office for two years, this language was not construed to cut down the term of office of the officers elected under the old charter, who held their office until the first Monday in May. This seems especially appropriate in view of the express language of Section 3, as follows:

"The officers of the present town government shall continue in office, under this charter, with such powers and duties as are herein prescribed, until their successors are elected and qualified," etc.

We say, therefore, that this construction actually placed upon the charter of the City of Santa Cruz is a very natural and reasonable construction. Whether or not such construction was strictly justified in law by the terms of the charter, one thing is certain, and that is, that the officers of the city, in holding their office until the first Monday of May, to wit, May 7, 1894, were acting in good faith and according to what they believed to be the law, and according to the time-honored custom in the said City of Santa Cruz. They were, therefore, as above stated, at the very least, emphatically *de facto* officers of the said city, whose right no one disputed, and their acts during that time are binding upon said city as respects third persons, even if they were not officers *de jure*.

The question whether a person is a *de facto* officer depends upon the actual facts. Is he in the actual possession and exercise of the office? Jeter was in the actual possession and undisputed and public exercise of the office of mayor until May 7, 1894. A third person dealing with the city, as were Coffin &

Stanton, or as were any of these bondholders, would have learned, upon inquiry anywhere in Santa Cruz, that Jeter was actually in possession of the office, and that the various persons who assumed to act as councilmen were actually acting as councilmen until May 7, 1894. On no theory would Robert Effey, the newly-elected mayor, and the newly-elected members of the city council, be even officers *de jure* until they had qualified by taking the oath of office. This taking of the oath of office was not necessarily a public act. A stranger going to the city and having dealings with city officers, as did Coffin & Stanton, or as would any of the bondholders if they looked up the matter, would not know, or be likely to know, whether or not this oath of office had been taken. A stranger would look, and would have a right to look, to see who were, in fact, the actual incumbents of the office and peforming the duties. The answer to this question, and this alone, would decide who were the officers *de facto*, and when such strangers saw that Jeter was acting as mayor, and that certain members were actually acting as members of the council, he would be entitled to rely upon their acts as the acts of officers *de facto* of the city.

In *Dillon on Municipal Corporations*, 4th Ed., Section 276, it is said :

"In this country the doctrine is everywhere declared, that the acts of *de facto* officers, as distinguished from the acts of mere usurpers, are valid, and the principle extends not only to municipal officers generally, but also to those composing the council, or legislative or governing body of the municipality" (citing many cases, both English and American, in the notes).

This doctrine as to the validity of acts of *de facto*

officers is the doctrine in California, as the cases in that State, below cited in this brief, fully show.

The learned counsel for the city of Santa Cruz undertakes to make an argument that as respects the signing of the bonds Jeter could not be mayor *de facto*, because it is not shown that he signed these bonds in public. It seems hardly necessary to state that, if Jeter was actually in posession of the office of mayor and exercising its functions at the time when he signed the bonds, it is immaterial in what particular place the bonds were signed. Obviously the said bonds would not be signed in the public streets, nor is it at all necessary that they be signed in a place of public resort. It is entirely proper that they be signed in some safe and secure place. The only question is whether at the time of the signing the said William T. Jeter was publicly exercising the duties of the office of mayor. A purchaser of these bonds was not necessarily expected to be present and see each bond signed, much less see each bond signed in public. It is enough if they were signed on days when persons signing them were generally in the possession and exercise of the offices of the city. This is within the reason and foundation of the rule which justifies third persons in relying upon the acts of persons who are actually *de facto* in office. This rule applies to signatures on bonds as well as to other acts, as the following decision shows:

In the case of *County of Ralls vs. Douglass*, 105 U. S., 728, the action was brought to recover a judgment on interest coupons issued by said county. Mr. Justice WAITE, stating the opinion of the court, says the questions presented in this case are (p. 729):

"1. Whether, if county bonds are issued in Missouri by a *de facto* county court, and are sealed with

the seal of the court and signed by the *de facto* president, they can be impeached in the hands of an innocent holder by showing that the acting president was not *de jure* one of the justices of the court."

On this point he says (p. 730):

"In no State is it more authoritatively settled than in Missouri that 'the acts of an office *de facto* (although his title may be bad) are valid, so far as they concern the public or the rights of third persons who have an interest in the things done.' In *State* v. *Douglass* (50 Mo. 593, 596), the Supreme Court of that State said: 'Without this rule the business of a community could not be transacted. The public are necessarily compelled to do business with an officer who is exercising the duties and privileges of an office under color of right, and to say that his acts as to strangers should be void would be productive of irreparable mischief. It would cause a suspension of business till every officer's right *de jure* was established.' To the same effect is *Harbaugh* v. *Winsor*, 38 *id.* 327. This is conclusive. The question here is not whether Dinmick was *de jure* probate judge of Ralls County, but whether he was acting under color or right as a justice and president of the county court. That is averred in the petition and not denied in the answer. His right to the office is one thing; his action while exercising the duties of the office, another."

The following cases show clearly that Jeter was at least *de facto* Mayor of the City of Santa Cruz at all the times in question.

In *The State of Wisconsin, ex rel. James H. Knowlton vs. John K. Williams*, 5 Wis., 308 (1856), the facts and decision are stated accurately in the head-note as follows:

"Where a governor continued to hold over, **after the expiration of his term, and after taking of the oath of office by his rightful successor,** on the assumption of his re-election, and under the certificate of the state canvassers, and so continued the acting governor, his approval of an act of the legislature was held valid, as the act of an officer *de facto*."

In *Carli vs. Rhener*, 27 Minn., 292 (1880), the facts were as follows, as stated by the court:

"Norgord was and acted as the judge of the municipal court of Stillwater for the two years prior to April 7, 1880. On that day Smith, who had been duly elected as his successor, **took the requisite oath of office** at five minutes after 11 A. M., and we may as well assume (what we understand to be the fact, though it does not appear as it ought to), that he immediately filed such oath in the office of the city clerk, as by law required, **so that he was duly qualified.** Norgord, between the hours of 11 and 12 of the same day, and after Smith had qualified, signed findings of law and fact in the case at bar, closing the same with a direction for judgment accordingly. * * * There is nothing to show that Smith in fact took possession of the office for which he had qualified, by exercising any of its functions or duties, until after the findings and direction had been signed and handed to the attorney for the successful party to be filed with the clerk.

Upon this state of facts, we are of opinion that the judgment was valid. * * * **Inasmuch as Smith had qualified,** he was *de jure* the judge, and Norgord's term *de jure* was, under the statute, at an end. * * * **But, as it in no way appears that Smith had taken possession of the office by exercising any of its duties or functions, Norgord, who was exercising its duties under the color spoken of, continued and was in possession of it.** His case is, therefore, that of an officer *de facto*—a person having and claiming color of title to an office by election or appointment, and in the exercise of its functions and duties; that is to say, in possession of it. The acts of such an officer are valid as respects the public and persons interested therein, and as to them cannot be questioned" (citing numerous cases).

In *Magneau vs. Fremont*, 30 Neb., 843, objection was made against the validity of a certain ordinance, on the ground that there was not present a quorum of legal members of the city council of Fremont, and that the prescribed number of legal members of that body did

not vote in favor of the passage of the ordinance. The Court says concerning these objections (p. 846):

"It is conceded that all who participated at the meeting when the ordinance was adopted were legal members of the council, except Peterson and Lowry, whose right to act is questioned, on the ground that their successors had previously qualified on April 7. The statute requires that two-thirds of all the members of the council shall be necessary to constitute a quorum for the transaction of business. It is obvious that if Peterson and Lowry could not lawfully act with the council at that meeting, no quorum was present and the ordinance is invalid.

"Section 12 of article 2, chapter 14, Compiled Statutes, provides that in cities of the second-class having more than 5,000 inhabitants there shall be elected annually in each ward one councilman, who shall hold his office for a term of two years, and until his successor shall be elected and qualified. There being no statutory provision fixing a particular date when the term of office of a councilman shall begin, it is believed that the provisions of said section 12 control and that the term of such officer commences immediately after the person elected has qualified.

"**While Morse and Hein had qualified,** they had not, as yet taken their seats in the council, or participated in the proceedings of that body. The names of Lowry and Peterson appeared upon the roll of members, and they were recognized as such by other members of the council, as well as by the mayor and city clerk. They took part in the proceedings of the council on April 9th without objection from any one, although Morse and Hein were at the time in the council chamber. We conclude, therefore, that Messrs. Morse and Hein were *de jure* officers and that Lowry and Peterson were *de facto* members of the city council.

"The cases are numerous which hold that the acts of a *de facto* officer, so far as they involve the interests of the public or third persons are as valid and binding as though he was an officer *de jure*. * * * * * *

"It follows from the reason of these cases that the acts of Lowry and Peterson are valid, and that there was a quorum of the city council present at the time the ordinance was adopted."

In *Hamlin vs. Kassafer*, 15 Oregon, 456, the Court states the facts as follows (p. 457):

"One E. D. Foudroy had been elected justice of the peace for the precinct of Jacksonville, at the general election in 1884, and had entered upon the discharge of the duties of his office; that at the general election in 1886, Foudroy was again a candidate for that office, but was defeated by one G. A. Hubbell, who **received the certificate of election and duly qualified,** and that he demanded of the said Foudroy the possession of said office, its docket, and books thereunto belonging, but that Foudroy refused to surrender the same, and continued to exercise and perform the functions of the said office; that, thereafter, and at the time of the rendition of the said judgment by the said Foudroy, he was in possession of said office in which he had held court as a justice of the peace," etc.

The Supreme Court therefore held that Foudroy was a *de facto* officer, and that the judgment obtained before him while he was such *de facto* officer was valid.

In *Brown vs. Lunt*, 37 Maine, 423 (1854), a justice of the peace took an acknowledgment of a deed after his commission had expired. It was proved that he constantly and frequently acted as justice of the peace after his commission had expired, and on these facts the Court held that he must be regarded as a justice of the peace *de facto* when he took the acknowledgment of the deed in question, and that therefore such acknowledgment was valid.

In *Petersilea vs. Stone*, 119 Mass., 465, one Farr was exercising the office of constable, and as such constable served a notice to take the poor debtor's oath. Farr had been for several consecutive years a constable in Boston, duly qualified to serve, and serving civil process, and was generally known as such, and held himself out as such. The notice in question was served after the expiration of his term, but while he

still was acting as a constable. The court held that he was constable *de facto*, DEVENS, J., giving the following opinion (p. 467):

"If Farr was an officer *de facto*, the validity of the service by him of the notice to take the poor debtor's oath cannot be inquired into collaterally. *Coolidge* v. *Brigham*, 1 Allen, 533. In order to show that he was not, the plaintiff relies upon the statement of BIGELOW, C. J., in *Fitchburg Railroad* v. *Grand Junction Railroad*, 1 Allen, 552, 557, that 'the exact distinction between an usurper or intruder, and an officer *de facto*, is this: the former has no color of title to the office; the latter has, by virtue of some appointment or election.' If this were intended as a general definition of an officer *de facto*, it would be incomplete, but the inquiry there presented to the court was as to the validity of certain acts done by one who acted under a commission *prima facie* valid, and issued by an authority apparently empowered to invest him with the legal rights and powers of the office to which he was appointed, and it is to be limited to the case then before the court. The reason of public policy, upon which it is held that the acts of an officer *de facto* are not to be called in question collaterally, but are valid as to third persons, may apply even to the case where such officer is a usurper and intruder. This principle has been applied in England to the most important office; after Edward IV. obtained the crown, the kings of the line of Lancaster, who had preceded him, were spoken of as '*nuper de facto et non de jure reges Angliæ*', but although Henry VI. had been declared a usurper by act of Parliament, attempts against his authority (not having been in aid of the rightful king) were capitally punished. 1 Bl. Com. 204. 4 Bl. Com. 77. Third persons, from the nature of the case, cannot always investigate the right of one assuming to hold an important office, even so far as to see that he has color of title to it by virtue of some appointment or election. If they see him publicly exercising its authority, if they ascertain that this is generally acquiesced in, they are entitled to treat him as such officer, and, if they employ him as such, should not be subjected to the danger of having his acts collaterally called in question (*Brown vs. Lunt*, 37 Maine, 423; *State* vs.

Carroll, 38 Conn., 449*)*. If the party thus recognizing the officer *de facto* were aware that such officer had some appointment or election, it would strengthen his belief, but without this he would be justified in believing that an authority publicly exercised and assented to was rightfully assumed *(Wilcox vs. Smith*, 5 Wend., 231*)*. The definition of an officer *de facto*, as given by Lord ELLENBOROUGH, in *The King vs. Bedford Level*, 6 East, 356, which he generalizes from that of Lord HOLT, in *Parker vs. Kett*, 1 Ld. Raym., 658, 660, is 'one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law,' and the above suggestions are in accordance with this definition. In the opinion in *People vs. Collins*, 7 Johns., 549, relied on by the plaintiff, it is held that the commissioners, whose acts were there in question, were officers *de facto*, as they came into their office by color of title; and it is added that 'it is a well settled principle of law that the acts of such persons are valid when they concern the public, or the rights of third persons who have an interest in the act done.'

"The principle, upon which the acts of officers *de facto* have been held valid, has sometimes been extended, so far as to protect them, under certain circumstances, when they have been directly proceeded against. The question then presented is not the same as that where the rights of third persons only are involved, and in such cases it would not be sufficent that they had publicly exercised such office, but they might properly be called upon to show they did so by virtue of some appointment or election, which they had a right to believe valid, even if it were otherwise *(State vs. Carroll, ubi supra)*.

"It was shown in the present case that Farr was 'notoriously acting' as constable, having an office in Boston, and upon its door his name with the addition of the word 'constable'; and, as to third persons, he must be deemed an officer *de facto*.

"Were it necessary, in order to maintain his proceeding, to show that he had color of title by some appointment or election, it would not, perhaps, be difficult to do so. Farr had originally a proper appointment, and even if he, who wrongfully holds over after the term for which he is appointed has expired, and this is known to him, cannot be said to hold by color of title, there are many cases where this expiration cannot be clearly ascertained. He who thus

continues to hold his office erroneously, but under a claim of right, honestly and reasonably made, has color of title from his original appointment or election (*Crew vs. Vernon*, Cro. Car., 97). These considerations have rendered it unnecessary to determine whether Farr was an officer *de jure*.

"*Judgment affirmed.*"

See, also, *Attorney-General vs. Crocker*, 138 Mass., 214. In this case the Court held that a certain town clerk was a *de facto* officer, whether or not he had ever had any valid appointment. The Court, in concluding its opinion, says (p. 222):

"The public and parties, having rights depending upon official acts, are not so much concerned with the title to an office, as they are that the duties of the office shall be performed, and the rights depending upon their performance secured and protected; and when they find an *actual incumbent of an office performing its duties*, they have a right to rely upon his acts as done by virtue of the office."

In *Galbraith vs. McFarland*, 3 Coldwell (Tenn.), 267, the facts and decision are stated accurately in the head-note, as follows:

"An act performed by a Clerk of the Circuit Court, after the term for which he was elected has expired by its own limitation, is valid. He was an officer *de facto*, and his official acts, so far as they affected the rights of third persons and the public, are as effectual and valid as if performed by an officer *de jure*."

5 *American and English Encyclopædia of Law* (1st Edition), p. 105, cited by the learned counsel for the city of Santa Cruz, expressly says:

"One holding after his term of office has expired, may be a *de facto* officer" (citing numerous cases).

The Supreme Court of Michigan, in *Johns vs. The People*, 25 Mich., 499, said (p. 503):

"Persons in the *actual and unobstructed exercise* of office must be held to be legal officers, except in proceedings where their official character is the issue to be tried as against themselves. As intimated in the latter case, *the title to office can never be tried collaterally.*"

State of Kansas vs. Buckland, 23 Kansas, 259, was a direct *quo warranto* proceeding to oust Buckland from the office of justice of the peace, and he was ousted. HORTON, C. J., states the facts as follows (p. 261):

"It appears from the agreed statement of facts that Buckland and Goit were each candidates at the general election in November, 1877, for the office of justice of the peace of Great Bend township; that the proper board of canvassers duly declared Goit elected to the office and issued to him a certificate of election; that he filed his official bond and oath of office at the time and in the manner prescribed by law."

Buckland, however, held over and continued in possession of the office until the issuance of the writ of *quo warranto*, which ousted him, as above stated.

In the later case of *Morton vs. Lee*, 28 Kansas, 286, it appears that judgment was rendered before the said Buckland, as justice of the peace (the same Buckland who was ousted in *quo warranto* in the case of *State of Kansas vs. Buckland*, 23 Kansas, 259, (above mentioned), and the sheriff made a levy under said judgment. The suit was to enjoin the sheriff from collecting the judgment. The court, giving the opinion, said (p. 288):

"After the issuance of the certificate of election to Goit he was a *de facto* officer only, for though he was not a good officer in the point of law, yet he had the possession of the books, papers and records of the office of justice of the peace, and continued to act as a justice of the peace until the rendition of the judgment in this court, and was recognized by a part of the public where he held the office as a justice of the peace of the township. His acts, while acting as a justice of

the peace *de facto*, upon principles of policy and justice, must be held valid so far as they involve the interest of the public and third persons.

"Some of the special findings of the trial court seem to conflict with our opinion that Buckland was a *de facto* officer at the time of the rendition of the judgment attempted to be enjoined; but we think that the evidence in the record clearly establishes the position we have taken. The finding that Buckland was generally recognized as a justice of the peace of Great Bend township by a portion of the public at the time of the rendition of the judgment of June 28, 1879, and that he had not been ousted by the process of any court after his qualification under his original appointment at the time of the rendition of such judgment justifies our conclusion. (2 Kent's Com. 295; 1 Abbott's Law Dict. 343; *State* v. *Carroll*, 38 Conn. 449–479; *Braidy* v. *Theritt*, 17 Kas. 468; 19 Am. Decisions, 61.)

"'The reasons of public policy upon which it is held that the acts of an officer *de facto* are not to be called into question collaterally, but are valid as to third persons, may apply even to the case where such officer is a usurper and intruder. * * * Third persons, from the nature of the case, cannot always investigate the right of one assuming to hold an important office, even so far as to say that he has color of title to it by virtue of some appointment or litigation. If they see him publicly exercising its authority, if they ascertain that this is generally acquiesced in, they are entitled to treat him as such officer, and if they employ him as such should not be subjected to the danger of having his acts collaterally called into question' (*Petersilia vs. Stone*, 119 Mass., 467).

"While the acts of officers *de facto* are valid and binding as to the public and third persons from considerations of public policy, yet as to the person exercising the duties of the office they are invalid, and afford him no protection whatever."

County of Wapello vs. Bigham, 10 Iowa, 39, was an action on a bond given by a surety of the treasurer of the county. The treasurer held over, and the court stated that he was a *de facto* officer. The main point in the case was, however, that the surety was not

liable on the bond except for the term for which it was given, and the court added that the law was the same "though the officer be re-elected to the same office."

In the case of *In Re Manning*, 139 U. S., 504, the writ of error was addressed to the Supreme Court of the State of Wisconsin to review a judgment of that court denying to Manning a writ of *habeas corpus*. The writ was applied for on the ground that the person who assumed to act as judge, and before whom Manning was tried, convicted and sentenced to imprisonment for manslaughter, was not a judge. This Court held, following the Supreme Court of Wisconsin, that he was at least judge *de facto*, and that the sentence and imprisonment were not a violation of the constitution of the United States.

In *Ball vs. United States*, 140 U. S., 118, it was alleged that Judge BOARMAN, in holding court in Texas, was not a judge, hence the sentence was invalid, but the Supreme Court, Mr. Chief-Justice FULLER giving the opinion, says (p. 128):

"We are of opinion that the irregularities alleged did not place Judge BOARMAN, in holding the October term, in any other position than that of a judge *de jure*, and that as to the April term, he was judge *de facto* if not *de jure*, and his acts as such are not open to collateral attack."

California holds the same doctrine as held elsewhere as to the validity of acts of de facto officers.

Thus *People v. Hecht et al*, 105 Cal., 621 (1895) was a proceeding by *quo warranto*, brought in the Superior Court, to determine by what authority the defendants, as individuals or as a board, were acting as a board of

fifteen freeholders to prepare and propose a charter for the city and county of San Francisco. The complaint averred, among other things, that the defendants were not and never had been a legally constituted board of fifteen freeholders, but had usurped the functions of said board, &c.; that no board was chosen by the voters, for the reasons that two of the persons elected were not eligible because they had not been for at least five years qualified electors of said city and county, as provided by the Constitution.

The Court held that "the defendants Hellman and Bourn, not having been for at least five years qualified electors of the City and County of San Francisco, were ineligible to the office of freeholder;" but that "the remaining thirteen members, who were regularly elected, constituted a legal board, with authority to act."

The Court discussed the subject of *de facto* officers as follows:

"Again, the office of freeholder is created by the Constitution. It is a *de jure* office. When Hellman and Bourn were elected by a plurality of the qualified electors, received their certificates of election, and qualified and participated in the action of the board, they were then under color of office and presumptively entitled to the office. They were *de facto* officers in the discharge of the duties of a *de jure* office, and as such their acts while they remained such were as valid and binding as those of *de jure* officers. There must be a *de jure* office to be filled before there can be a *de facto* officer.

"If the former exists, and the latter holds it under and pursuant to a regular Commission purporting to empower him to act, his acts in such office, until his right thereto is judicially determined, the law holds upon principles of policy and justice to be valid so far as they involve the public and third parties, notwithstanding the personal liability of the incumbent for intruding into such office. * * *

"We reach the following conclusion: [1. That the thirteen freeholders were competent to organize and act as a board].

2. J. W. Hellman and William B. Bourn were not eligible to the office of freeholder, and, although regularly elected and commissioned, are not *de jure* officers of the board; 3. Said Hellman and Bourn having been elected and commissioned, became *de facto* members of the board, and as such their acts were and are valid as to the public and third parties."

So, also, in *People vs. Sehorn*, 116 Cal., 503 (1897), the defendant was charged by the information with murder, and was convicted of manslaughter. It was contended, on appeal, that on account of alleged defects in the preliminary proceedings before the committing magistrate, defendant's motion to set aside the information should have been granted.

The Court said, on the question of the power of the committing magistrate to act:

"It is contended that Jansen, who was called in to conduct the preliminary examination, was not a justice of the peace, and could not legally commit the defendant. The facts upon which this contention is made are these: After Jansen had been appointed justice of the peace of the second judicial township the board of supervisors of the county undertook to change the boundaries of the township in such a manner as to make him a non-resident thereof. It is somewhat doubtful, upon the record, whether any valid order was ever made changing the boundaries of said township, but, assuming that it was legally made, and that thereafter the said Jansen was not a resident of the township as thus changed, still he continued to act as such justice and to do business as the justice of said township. No other person was appointed to fill said office, and he continued to perform the duties of said office up to and during the said preliminary examination. He never was ousted from said office by *quo warranto*, or any other similar proceeding. He was, therefore, a *de facto* justice of the peace of said township, and his right to exercise the functions of his office cannot be questioned in this or any

other collateral proceeding. (Throop on Public Officers, secs. 625, 631, and cases there cited; People v. Roberts, 6 Cal. 214; Case v. State, 59 Ind. 46; Woodside v. Wagg, 71 Me. 207; Sheehan's Case, 122 Mass. 445; 23 Am. Rep. 374; People v. Hecht, 105 Calif. 621; Hull v. Superior Court, 63 Calif. 177.)"

S. P. *Buck vs. City of Eureka*, 109 Cal., 504, as to validity of acts of *de facto* officer.

CASES AS TO DE FACTO OFFICERS CITED BY COUNSEL FOR CITY OF SANTA CRUZ, NOT APPLICABLE.

The learned counsel for the city of Santa Cruz cite certain decisions of various courts.

The case of *Trinity Co. vs. McCammon et al.*, 25 Cal., 117, was *a direct proceeding against an officer, enjoining him from acting after his successor had been elected and qualified;* and the court, of course, held that against him, in that direct proceeding, he was only a usurper. That was not a case where the person had acted as an officer *de facto*, and where the rights of third persons were involved.

Becker vs. People ex rel. Wilson, 156 Ill., 301, was, as is shown by the title of the case, *a direct proceeding to oust certain persons from office.* Of course, it has no bearing on the question whether a person is or is not a *de facto* officer.

The case of *People ex rel. Harris vs. Brenham*, 3 Cal., 477, cited by the counsel for the city of Santa Cruz, was a direct proceeding in *quo warranto* to try title to the office, and, of course, did not involve any question of anyone's being *de facto* officer.

Connolly vs. Ashworth, 98 Cal., 205, was an appeal to the Supreme Court from the judgment of the Superior Court. The judgment appealed from had been

filed with the clerk of the Superior Court after the judge who had rendered the decision had ceased to be judge *de jure* or *de facto*. In other words, he had vacated and actually gone out of office before the decision was filed with the clerk. The Supreme Court, *on direct appeal from this very judgment* so filed with the clerk, reversed the judgment, holding that, at the time it was filed, the person whose name it bore as judge was not judge, either *de jure* or *de facto*.

In *Broder vs. Conklin*, 98 Cal., 360, the facts were that a motion was made in the lower court to set aside a judgment, which motion was granted on the ground that the person who, as judge, had mailed the judgment to the clerk, had ceased to be judge before the judgment was filed. This was *a direct attack upon the judgment*, by motion, to set it aside, which was accordingly done, and the Supreme Court of the State, of course, affirmed the decision of the lower court setting the judgment aside.

People, ex rel. Morton, vs. Tieman, 8 Abbott's Practice (N. Y.), 359, was an application by the relator for writ of mandamus to compel the drawing of a warrant to pay the relator the salary of city inspector from the first day of January, 1859, at which time his office had expired, and since which time he had been holding over. Of course the writ was refused, as a *de facto* officer cannot claim salary unless he is also a *de jure* officer. He is not an officer as to himself, but as to third persons and the public.

In *Boardman vs. Halliday*, 10 Paige, 223, the question was whether a certain person was *de facto* in the exercise of the office of a deputy of the then existing sheriff, and the court merely held that there was not

sufficient in the facts to enable it to say that he was. The court says (p. 233):

"I am not prepared to say Poppino might not have been considered a deputy of the under-sheriff, in the present case, *de facto*, so as to render his acts valid as to third persons, if it had distinctly appeared that he was professedly acting as a deputy of the under-sheriff, and with his knowledge and consent."

In *Williams vs. Boynton*, 147 N. Y., 426, the action was to have certain proceedings of the Board of Supervisors of the county declared illegal and void, and to restrain certain other official acts. This was *a direct proceeding*, and in this proceeding the court held that a certain person who assumed to be supervisor was not supervisor. The court said it was not a case for the application of the doctrine which applies to *de facto* officers, saying (p. 432):

"No private individual had acquired any right upon the faith of the resolution, and before the public had or could acquire any, the validity of the action was challenged, and the very office of the injunction was to stop the incomplete and inchoate act so as to prevent either individuals or the public from being in any manner affected by it. But if the doctrine had any proper application it is still true that Sullivan was not a *de facto* officer, because, when he cast his vote, he had no color of title and was a mere usurper and intruder."

In *Edison vs. Almy*, 66 Mich., 329, (s. c., 9 West. Rep., 730) the action was brought on a judgment rendered by a justice of the peace after his term of office had expired. The defendants did not appear before the justice of the peace, having previously notified plaintiff's attorney that they would not do so on account of Holcomb's ceasing to be justice. The court, of course, held the judgment void.

Becker vs. The People, 106 Ill., 301, was also a direct

proceeding to try title to the office by *quo warranto*.

In *State vs. Carroll*, 38 Conn., 449 (1871), the question involved was whether a certain Mr. Morse was a judge, so that his acts were valid. The court held that he was at least a judge *de facto*, and that, therefore, his acts as judge were valid. That was not a case of an officer holding over, and the court did not decide or even discuss any question as to whether an officer holding over might or might not be an officer *de facto*. No such question was before the court.

In *School District vs. Smith*, 67 Vermont, 566, cited by the learned counsel for the city of Santa Cruz, the court says (p. 568):

"Huse was not, therefore, legally elected. But it is said that he was treasurer *de facto*. But the defendant was in actual possession of the office; and an officer *de jure* and an officer *de facto* cannot both be in possession of the same office at the same time."

Vogel vs. State of Indiana, ex rel. Land, 107 Indiana, 374; s. c., 5 West. Rep., 546, was a direct proceeding, by information, to try title to the office in question.

In *Burke vs. Elliott*, 4 Iredell (N. C.), 355, the court expressly held that the officer there in question was an officer *de facto*, and that his acts were as effectual, as far as the rights of third persons or the public were concerned, as if he was an officer *de jure*.

The same thing was also held by the same court in the case of *Gilliam vs. Reddick*, 4 Iredell, 368.

In the case of *State vs. Lewis*, 107 N. C., 967, cited by the learned counsel for the city of Santa Cruz, the officer there in question had ceased by his own act, and by his express declaration to that effect, to be a judge, and he was not, therefore, a *de facto* judge.

In the case of *Hughes vs. Long*, 119 N. C., 52, cited by the learned counsel for the city of Santa Cruz, the court says, respecting the officer there in question (p. 56):

"In the present case, there is no proof nor any attempt to prove that Douglass Williams, for a period of nearly two years after his commission expired, attempted any act as a notary public, until in the present case, nor does it appear in any manner that he was recognized in the community in which he lived as such an official."

In the case of *Coler vs. Cleburne*, 131 U. S., 162, the bonds there in question on their face purported to have been executed on January 1, 1884. They were, in fact, executed and delivered on July 3, 1884. They were signed by W. N. Hodge, a private citizen, but formerly mayor of the city, whose term of office had expired in April, 1884. J. M. Odell, who was elected mayor in 1884, was the legally-qualified and *acting* mayor of the city on July 3, 1884. The court, therefore, held that the bonds had not been signed by the mayor. W. N. Hodge was not the acting or *de facto* mayor of the city. J. M. Odell was actually and *de facto* and *de jure* mayor on July 3, 1884, and he had at all times refused to sign the said bonds.

The case of *Coler vs. Cleburne* is not like the present case, for in the present case these bonds were nearly all of them signed by William T. Jeter as mayor, while he was clearly mayor both *de jure* and *de facto*, and the remainder were signed while he was clearly *de facto* mayor. Furthermore, all of said issue of bonds signed by him were delivered under the order of the city counsel and by the city clerk. In other words, all of the then existing officers of the city joined in delivering these bonds as the bonds of the city.

Judge DE HAVEN, before whom the present case was tried, says, in his opinion, concerning *Coler vs. Cleburne* (Record, p. 49) :

"That case is not authority for the proposition that the action of a *de facto* officer in signing bonds would not be as binding upon the municipality for which he assumes to act as that of an officer *de jure;* and it seems clear to me that if Jeter was the *de facto* mayor when he signed the bonds sued on, then such signature by him was a compliance with the ordinance requiring them to be signed by the mayor; and so, also, if he was *de facto* mayor, and those assuming to act as the common council of the defendant were *de facto* members of the common council at the time when he and they assumed as mayor and common council to accept the proposition of Coffin & Stanton in relation to the bonds, and directed their delivery to that firm, then such acts upon their part are to be treated, so far as concerns the public and third persons having an interest in what was done by them as the acts of the *de jure* mayor and common council of the city."

The city of Santa Cruz took certain exceptions as to the admission of evidence respecting the question whether or not Jeter and others were officers of the city, at least *de facto.* It is not necessary to consider those exceptions to the admission of evidence separately, as substantially the same question arises on the findings of fact.

But even if it be supposed that when William T. Jeter signed some of these bonds now in question on the 16th day of April, 1894, he was not de facto mayor (we have, however, clearly shown above that he was such de facto mayor), still it is not open to the city of Santa Cruz to make any defense to these bonds as respects such signature. These bonds bore

date April 16, 1894, when Jeter was clearly Mayor de jure and de facto ; they were sealed with the city seal, and attested by the city clerk. Said clerk, O. J. Lincoln, was clearly clerk both de jure and de facto during all of the times in question. These bonds were ordered delivered by the city council, and were delivered by the city clerk as the bonds of the city (Finding of Fact, No. 11, Record, p. 23).

The precise point as to Jeter's signature being valid and binding upon the city under such circumstances, even if he was not a *de facto* officer, has been expressly determined by this Court in the case of *Town of Weyauwega vs. Ayling*, 99 U. S., 112. In that case the Court said (p. 117) :

" As printed, the bonds bore date June 1, 1871. At that time Fenelon was chairman and Verke clerk. The signatures of these officers were lithographed and printed on the coupons. Before the bonds were actually signed by Verke, he had resigned his office and moved out of the town. Another clerk had been appointed and qualified in his place. Apparently to save the expense of new lithograph and another printing of the bonds, Verke, after going out of office, affixed his signature to those which had been printed. These bonds so signed by Verke and by Fenelon, who actually was chairman at the time, were taken by Fenelon and delivered to the railroad company. This having been done, Ayling, the defendant in error, purchased the bonds to which the coupons sued on were attached, and paid their full value without notice of any claim of defence to their due execution. Under these circumstances, we think the town is estopped from proving that Verke in fact signed the bonds after he went out of office. If Ayling had put himself on inquiry when he made his purchase he would have found, 1, that the town had authority to vote the bonds ; 2, that the necessary vote had been given ; 3, that at the date of the bonds Verke was clerk and

Fenelon chairman; 4, that their signatures were genuine; and, 5, that the bonds had actually been delivered to the railroad company by Fenelon, who was at the time chairman. If a bank puts out a note for circulation bearing the signature of one who was in fact president of the bank when the note bore date, no one will pretend that it could be shown as a defense to the note when sued upon by a *bona fide* holder, that the signature of the person purporting to be president was affixed after he went out of office. So, if one puts out a note purporting to be signed by himself, but which was in fact signed by another having at the time no authority from him, he cannot prove the forgery or want of authority in the signer as against a *bona fide* holder. The reason is obvious. The bank by issuing the note, and the individual by delivering the paper which purported to be his obligation, adopted what they thus put out as their own, and became bound accordingly."

L.

The Polls at the bond election were kept open as required by law.

Section 1 of the refunding bond act of March 1, 1893 (Session Laws of California, 1893, p. 59), provides:

"Said election shall be called and held in the same manner in which other elections are held in such city or town".

Section 5 of the Charter of the city of Santa Cruz (Session Laws of California, 1875-6, p. 189, 191) provides:

"SEC. 5. It shall be the duty of the Mayor and Common Council to call all city elections, to designate the time and place of holding the same—giving at least ten days' notice thereof—and for each ward they shall appoint one Inspector and two Judges of Election, residents of their respective wards, who, together with two clerks to be appointed by them, shall take the oath of office prescribed by law for Inspectors,

Judges, and clerks of State and county elections, and all provisions of law regulating elections for State and county officers shall apply, as far as practicable, to elections under this charter. The polls for all elections shall be opened at nine o'clock A. M., and shall not be closed until sundown of the same day. In case any of the officers so designated shall fail to attend, those attending, with the electors assembled, shall fill their places by appointing other competent persons from among the qualified electors present; and all returns of city elections shall be made out and signed by the officers of such election, in the usual form, and deposited with the City Clerk, and the persons having the plurality of the votes cast for each of the respective officers voted for shall be declared duly elected; and no person who is not a qualified voter shall be eligible to any office under this charter, nor shall any person be entitled to vote at any city election, unless he be an elector for State and county officers, and shall actually have resided within the ward in which he claims his vote thirty days next preceding such election."

The *Political Code* of California, as amended by an act approved March 20, 1889 (Session Laws of California, 1889, p. 423), provides (p. 425):

"1160. The polls must be opened at sunrise of the morning of the day of election, and must be kept open until five o'clock on the afternoon of the same day, when the polls shall be closed."

The Political Code of California, as amended in 1889, long after the adoption of the charter of the city of Santa Cruz, found in the session laws of California, 1875–6, thus expressly provided that in all elections the polls should be closed at five o'clock. This general law contained in the Political Code controlled the charter of the city. See on this subject the cases cited on this brief, pages 234–239.

Even if it were true that the polls were not kept open at the election for a proper

length of time, yet they were kept open substantially the required time, and any irregularity in this respect is immaterial so long as it not shown that it changed the result of the election.

In Dillon on Municipal Corporations, 4th Ed., Vol. I., § 197 note, the author says:

"It is a canon of election law that an election is not to be set aside for a mere informality or irregularity which cannot be said in any manner to have affected the result of the election" (citing numerous cases).

In *People vs. Prewett*, 124 Cal., 7, it was contended that a school election was invalid, on the ground that the polls did not open until one-half hour after the appointed time. The statute required the polls to be open not less than four hours. The notice stated that they would be open between the hours of one p. m. and five p. m. As a matter of fact they did not open until about one thirty. The court held the election valid, saying (p. 11):

"There is no claim that any one was prevented from voting either because of the notice or because the polls were kept open a little less than four hours."

The learned counsel for the defendant The City of Santa Cruz in their brief before the United States Circuit Court of Appeals, undertook to make an argument to the effect that by the polls being closed at five o'clock, instead of being kept open until sundown (see Finding of Fact by the Court, Record, p. 33), a large number of voters in the city of Santa Cruz were unjustly deprived of their right to vote. This argument is utterly without foundation. As we have already seen, the general law contained in the political code,

Section 1160, as amended in 1889, expressly provides that the polls shall be closed at five o'clock. Not only so, but the notice of election expressly provided (Record, p. 38):

"The polls of such election shall be opened at sunrise in the morning of said day of election, and shall close at five (5) o'clock p. m. of the same day."

Any and all voters of the city of Santa Cruz were thus specifically notified that the polls would close at five o'clock. They had all day, from sunrise in the morning until five o'clock in the afternoon, in which to vote, and in view of this express provision in the political code, and this express provision in the published and posted notice of election, that the polls would open at sunrise and close at five o'clock, it is preposterous to argue that any voter in Santa Cruz was unjustly or illegally deprived of his right to vote. There is nothing in the findings of fact in the present case, nor is there the slightest evidence in the record (even if evidence could be resorted to, as it cannot), to show that there was not a full, free and fair vote by the qualified voters of the city of Santa Cruz, or that a single voter in the city was deprived of his vote by the polls closing at five o'clock, instead of closing at sundown, even if that were the law.

Furthermore, no one in the city of Santa Cruz questioned in any way the legality of this election until after these negotiable refunding bonds were put out, although all of them knew that these refunding bonds, with their recitals, were to be issued, and might come into the hands of innocent holders. The city cannot be heard at this late day to question the validity of this election.

But even if it were true that the charter provision that the polls should be kept open until sunset was the one that governed, and not the later provision in the political code, Section 1160, as amended in 1889, then the recital in the bonds in question in the present case (Record, p. 5), that this election was " duly and legally called and held and conducted in said city as provided under said act " (the refunding act), is conclusive in favor of the bona fide holders of these bonds, and the city is estopped from making any such defense as that the polls were closed too early.

For this proposition it is unnecessary to cite decisions. See, however, the cases cited on this brief, pages 244, 245.

M.

There is no question of over-issue of bonds involved in the present case.

The learned counsel for the City of Santa Cruz, in their brief in the United States Circuit Court of Appeals, undertook to make an argument that the bonds and coupons in question in the present case are invalid on the alleged ground that they constitute an over-issue. Any such argument is clearly erroneous, for the following reasons:

There is no limitation in the constitution of California as to the amount of bonds that may be issued by a municipality, so long as there is a vote of the people had for such issuance, and so long as provision is made for the collection of an annual tax sufficient to pay the

interest and constitute a sinking fund, both of which conditions were complied with in respect of the present issue of bonds.

The constitution of California (Article XI., Section 18, as amended by Assembly Constitutional Amendment No. 7, Session Laws of California, 1891, p. 523) provides as follows (p. 524):

"SECTION 18. No county, city, town, township, Board of Education, or school district shall incur any indebtedness or liability in any manner, or for any purpose, exceeding in any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof on or before maturity, which shall not exceed forty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void."

The bonds in question in the present case are refunding bonds, issued under the act of March 1, 1893. Neither that act nor any other statute of California prescribes any limit as to the amount of refunding bonds that may be issued.

The provision in the said act of March 1, 1893 (see the act printed on this brief, p. 3), authorizes cities to refund "outstanding indebtedness evidenced by bonds and warrants thereof." No limit is placed upon the amount of such refunding bonds that may be issued. The argument of the learned counsel for the city under this point amounts to this proposition—namely, that the original bonds which were refunded by the bonds now in question were not bonded

indebtedness of the city, but no such proposition or argument as this can be made by the city against the validity of the present bonds, for those bonds expressly recite that they are

" issued by the said City of Santa Cruz for the purpose of refunding the *bonded indebtedness of said city*, and issuing bonds therefor, and providing for the payment of the same under and in pursuance of and in conformity with the provisions of an act * * * approved March 1, 1893 " (reciting in full the title of said act).

See on this point the numerous cases decided by the Supreme Court of the United States, cited in this brief under Point I., pages 40 to 79.

Limitations in Public Improvements Bond Act relate only to bonds for public improvements, and that act does not limit amount of refunding bonds.

The learned counsel for the city cites the provisions of the act approved March 19, 1889 (Session Laws of California, 1889, p. 399), as amended by the Act of March 11, 1891 (Session Laws of California, 1891, p. 84). Section 5 of the said Act of March 19, 1889, is as follows :

" SEC. 5. No city, town or municipal corporation shall incur an indebtedness *for public improvements* which shall in the aggregate exceed *five* per cent. of the assessed value of all the real and personal property of such city, town or municipal corporation."

This section was amended by said Act of March 11, 1891, so as to read as follows :

" SECTION 5. No city, town or municipal corporation shall incur an indebtedness for public improvements which shall in the aggregate exceed *fifteen* per cent. of the assessed value of all the taxable real estate and personal property of such city, town or municipal corporation."

The subject matter of the said act of March 19, 1889, relates exclusively to public improvements and bonds issued for public improvements. The said Section 5, as it appears in the said original act of March 19, 1889, and also as it appears in the said amendatory act of March 11, 1891, places a limitation only upon "indebtedness for public improvements." The said act of March 19, 1889, does not deal, or profess to deal, in any manner with the issuance of refunding bonds, nor undertake to place any limit upon the amount of refunding bonds that may be issued. Any one examining the statutes of the State of California for the provisions of the law relating to the issuance of refunding bonds would not find anything in the said act of March 19, 1889, as amended by the act of March 11, 1891, making any limit whatever upon the amount of refunding bonds that might be issued, nor any provisions whatever as respects refunding bonds.

The Refunding Act and the Public Improvements Bonds Act are wholly independent Statutes, as has been expressly decided by the Supreme Court of California.

The case of *City of Los Angeles v. Hance*, 122 Cal., 77, involved this precise question. Chapter 82 of the Session Laws of California, 1897, provided (Section 4):

"Chapter eighty-two of the statutes of eighteen hundred and eighty-three, chapter forty-eight of the statutes of eighteen hundred and ninety-three and chapter one hundred and seventy-six of the statutes of eighteen hundred and ninety-five, all being laws of the State of California in conflict herewith, are hereby repealed."

The title of Chapter 82 of the Laws of 1897 is as follows:

"An Act authorizing the Common Council, Board of Trustees, or other governing body of any incorporated city or town, other than cities of the first class, to refund its indebtedness, to issue bonds therefor, and to provide for the payment of the same."

Chapter 48 of the Statutes of 1893 (which the said Section 4 of Chapter 82 of the Laws of 1897 undertook to repeal) was an act amending Section 6 of the Act of March 19, 1889, relating to the issue of *bonds for municipal improvements.* On these facts the Court expressly held that the said Chapter 48 of the Statutes of 1893 was in full force and unrepealed. The Court said (p. 78):

"*The subject of the repealing act*, as expressed in its title, *is entirely foreign to the subject of the section attempted to be repealed*, and the question to be determined is, whether an act, or part of an act, can be repealed when the title of the repealing act announces no such intention, and *when the repeal of the existing law would have no effect one way or another upon the operation of the new law.*

We think it very clear in such a case no repeal is effected, because the repealing clause is in conflict with that part of section 24 of Article IV of the constitution, which reads as follows: 'Every act shall embrace but one subject, which shall be expressed in its title. But if any subject shall be embraced in an act which shall not be expressed in its title, such act shall be void only as to so much thereof as shall not be expressed in its title.'"

The act entitled "An act authorizing the incurring of indebtedness by cities, towns or municipal corporations, incorporated under the laws of this State," approved March 15, 1887, which act is mentioned in Ordinance No. 314 (Additional Finding of Fact No. 1, Record, p. 26) as the act under which were issued $225,000 original water works bonds and $39,000 other improvement bonds of the City of Santa Cruz, re-

funded by the bonds now in question, *did not contain any limitation upon the amount of bonds that might be issued or indebtedness incurred for water works or other municipal purposes, under the provisions of said act.* Therefore, any argument made by the learned counsel for the city, that the original bonds refunded by the bonds now in question were invalid, as being beyond any limit prescribed by the statute under which they were issued, is wholly without foundation, as the said act of March 15, 1887, contained no limit whatever.

It may be that the learned counsel for the City of Santa Cruz mean to argue that the original bonds, which were refunded by the refunding bonds now in question, were invalid because issued in excess of some limit prescribed by the said act of March 19, 1889, or the said act of March 11, 1891. If so, then obviously their argument is not that the refunding bonds now in question are invalid as constituting an over-issue beyond a limit prescribed by the statute, for, as we have seen, there is no limit prescribed by statute to the issuance of refunding bonds, but their argument amounts, we repeat, to the proposition that these refunding bonds are invalid because the original bonds which they were issued to refund were invalid.

If this be their proposition, then there are obviously several conclusive answers to any such argument. The first answer is, as we have stated above, that the act of March 15, 1887, under which such original bonds were issued, contained no limit as to amount of bonds which might be issued or indebtedness incurred thereunder. The second answer is, that the recitals in the bonds are conclusive that these present refunding bonds were issued to refund "bonded indebtedness" of the City of Santa Cruz (see on this point the

numerous decisions of the Supreme Court of the United States quoted on this brief under Point I., pp. 40–49).

The holder of negotiable refunding bonds is not bound to see to the validity of the original bonds which are refunded thereby.

This has been expressly decided by the Supreme Court of California in *Meyer vs. Brown*, 65 Cal., 583 [1884], quoted at length on this brief, p. 180. This has also been expressly decided by this Court in the case of *Graves vs. Saline County*, 161 U. S., 359. In that case some of the bonds which were refunded were void and uncollectible, even in the hands of *bona fide* holders, this Court expressly stating (p. 373):

"If the present case stood only on the footing of the original conditional contract of subscription we would be compelled to follow the holding of the Supreme Court of Illinois, and to hold that the original bonds were uncollectible even by innocent holders."

Those void bonds, however, were refunded by authority of a vote of the people of Saline County, and the Supreme Court of the United States expressly held that such refunding bonds were valid bonds in the hands of *bona fide* holders (see this case of *Graves vs. Saline County*, stated at length on this brief, p. 58).

See, also, the case of *County of Jasper vs. Ballou*, 103 U. S., 745, where this Court says (p. 752):

"Whether these bonds [that is, the old ones] were valid was, so far as any direct decisions were concerned, an open question, and certainly not free from doubt. Under these circumstances the question was directly put to the people of the county, in a manner authorized by law, whether they would recognize these bonds as 'binding and subsisting legal obligations,' and issue in lieu of them other bonds having twenty years

to run and bearing seven per cent. interest instead of ten, and they by their vote said they would. * * * As was very properly said below by the learned circuit judge, 'there must be an end of these contests and defenses some time or other.' There must be a time when the people in their political capacity are concluded by their contracts as much as individuals, and we think that where the people of a county, at an election held according to law, authorize their corporate or political representatives to treat certain outstanding county obligations as 'properly authorized by law" for the purpose of negotiating a settlement with the holders, and the settlement which was contemplated has been made, all contests as to the validity of the obligations must be considered as ended."

See, also (quoted on this brief, p. 68), the case of *State of California vs. Wells, Fargo & Company*, 15 California, 336 (1860), in which the Supreme Court of California held that refunding bonds issued by the State were negotiable instruments, and that it was immaterial that the warrants which they had been issued to refund were stolen from the treasury of the State after they had been already paid and canceled.

Furthermore, the defendant The City of Santa Cruz did not prove that any of the original bonds refunded by the present issue of bonds were invalid either because said original bonds exceeded in amount any limit prescribed by the statutes of California or for any other reason.

There is not only no finding of fact by the Circuit Court to support any such defense of over-issue of such original bonds, but not even any evidence which would support any such finding, if this Court were at liberty to examine the evidence on this point, as it is not, because the findings are conclusive, and this Court cannot look into the evidence.

In other words, the defendant The City of Santa Cruz did not prove any facts to support any such defense, even as against any person, whether he was a *bona fide* holder or not.

The finding of the court is (Record, p. 19, Finding No. 5):

"That on March 13, 1894, the defendant had an outstanding bonded indebtedness of $271,000, or thereabouts, and on said day the assessed valuation of all the taxable real estate and the personal property in said city was $3,907,404; that on said date there was submitted to the qualified electors of the defendant corporation," &c. (here stating the submission of the question of issuing the refunding bonds).

Fifteen per centum of $3,907,404 would be $586,110.60. Of course, assuming that they were all issued for municipal improvements, and were, therefore, all within the provision of Section 5 of the act of March 19, 1889, as amended by the act of March 11, 1891, above quoted, they were way within the fifteen per cent. limit prescribed by the said section.

If, however, the counsel for the defendant the City of Santa Cruz claim that these old bonds ought to be, but were not, within the five per centum limit prescribed by the act of 1889, still it is true that no facts were proved to support any such defense, even as against any person, whether he was a *bona fide* holder or not.

Obviously the question whether these original bonds were valid or not, as being within the limit prescribed by the statutes, would have to be ascertained, not as of the time when they were refunded, but *as of the time when they were issued.* In other words, in order to ascertain whether the said original bonds, if issued for municipal improvements, were within the fifteen per

cent. limit, or within the five per cent. limit, or within any other limit, it would be necessary to ascertain the amount of the indebtedness of the city and the amount of the assessed valuation of the city, not as of the date when such bonds were to be refunded, but as of the date when the said original bonds were issued, or when the indebtedness was incurred which was represented by the said original bonds. *The findings of fact made by the Circuit Court in the present case do not include any findings upon any such facts as of the date when the said original bonds were issued.* The Court does not find what was the indebtedness on the date of the issue of such original bonds, nor does it find what was the assessed valuation of the taxable real estate and personal property in the said city on such date. Not only were there no such findings of fact, but no evidence was presented as to what were such facts, even if this Court were at liberty to look into the evidence, as it is not.

The original bonds, therefore, were valid so far as respects any limitation of amount prescribed by the said acts of March 19, 1889, and March 11, 1891, or as respects any limitation prescribed by any other statute. No defense was proved to impeach said original bonds in this respect, or in any other, even as against a person who was not a *bona fide* holder of the old bonds, or the refunding bonds, much less as against a person who is a *bona fide* holder of the refunding bonds now in question.

Neither the constitution nor any statutes of the state prescribed any limit as respects the amount of refunding bonds that might be issued.

The learned counsel for the defendant, the City of Santa Cruz, in their brief in the United States Circuit

Court of Appeals, argued that the bonds now in question were invalid, because the total amount of these refunding bonds, $360,000, added to the total amount of the old bonds to be refunded (or added to the total amount of old bonds to be refunded, less the $98,000 bonds of the water company assumed by the City of Santa Cruz and authorized, among others, to be refunded), exceeded fifteen per cent. of the assessed valuation of the taxable real estate and personal property in the City of Santa Cruz. The learned counsel thus attempts to argue that Section 5 of the act of March 19, 1889, as amended by the act of March 11, 1891, places a limit upon the amount of refunding bonds that can be issued. They attempt to add together the original indebtedness incurred for public improvements and the refunding bonds issued to refund the same and say that because the two amounts added together exceed fifteen per cent. of the assessed value of the taxable property in the city, therefore, the refunding bonds are invalid. It is clear that such an argument is entirely without foundation. There is, as above stated, no limit in the constitution as to the amount of bonds of any kind that may be issued by municipalities so long as there is a vote of the people and tax levy had with respect to such bonds, both of which were had in respect of the present refunding bonds.

No such question arises, therefore, in this case, as arose in the case of *Doon Township vs. Cummins*, 142 U. S., 366. That case arose under the constitution of Iowa, which provided (Article XI., Section 3):

"No county, or other political or municipal corporation, shall be allowed to become indebted in any manner, or for any purpose, to an amount, in the aggregate, exceeding five per centum on the value of the taxable

property within such county or corporation—to be ascertained by the last State and county tax lists, previous to the incurring of such indebtedness."

Doon Township issued certain bonds to refund its old indebtedness, and sold such new bonds and delivered them while the old bonds were outstanding, so that at the same time both the old issue of bonds and the new issue of bonds were outstanding, and the two together exceeded the five per cent. limit. This Court held that both issues of bonds constituted an indebtedness against the said Doon Township, and that, because the aggregate amount of both issues exceeded the five per centum limitation, therefore the new bonds were invalid, the reason being that the constitution prohibited the township from becoming "indebted in any manner, or for any purpose"—that is, even for the purpose of refunding an old issue of bonds—beyond the five per cent. limitation. That case was decided expressly on the said debt limitation in the Iowa constitution. If there had been no such debt limitation in the constitution the case would not have been decided as it was.

There is no such limitation in the constitution of California. The refunding act of March 1, 1893, expressly provides for the sale of the refunding bonds and for the application of the proceeds of the sale to the purpose of refunding the indebtedness for which the refunding bonds have been issued, thus contemplating that there may be a time when both the old bonds and the new will both be outstanding. There is no debt limitation in the constitution, nor is there anything contained in the said refunding act which prevents both the old issue of bonds and the issue of

refunding bonds from being outstanding at the same time.

Furthermore, there is no finding of fact that these old bonds of the City of Santa Cruz, or some of them, authorized to be refunded by the present issue of bonds, were not, as a matter of fact, taken up and paid and retired by the City of Santa Cruz before or at the time the refunding bonds were issued. There is, therefore, no proof of any fact to support the claim of the defendant that both issues of bonds were, as a matter of fact, outstanding at the same time. Probably they were not so taken up, because there is a finding (Record, p. 15, Finding No. 24) that Coffin & Stanton did not comply with their agreement to pay for the refunding bonds, but this finding is not necessarily and conclusively inconsistent with the city's having itself taken up and paid the old bonds refunded, or some of them. Such a defense to these refunding bonds cannot be sustained without a finding of facts to support it. As the findings now stand, there is no finding that both the old bonds refunded and the refunding bonds themselves were all out at the same time. We mention this want of a finding of facts to support the defense, not because with think such defense would be good even if such finding of facts existed, for there is no limitation upon the amount of refunding bonds which may be issued, and no provision that refunding bonds may not be sold and delivered in advance of the bonds refunded thereby, but in order to call the attention of this Court to the fact that this defense has no finding of fact to rest upon, even if such finding of fact would be sufficient.

NO NOTICE OF OVER-ISSUE FROM CIRCULAR OF COFFIN AND STANTON.—The learned counsel for the City of Santa Cruz, in their brief in the Circuit Court of Appeals, attempted to show that some circular issued by Coffin & Stanton, to wit :—the circular printed in the evidence on page 97 of the record, gave notice to the purchasers of these refunding bonds that there was an over-issue of bonds. The first answer to this is that the findings of fact made by the court do not find or make reference to any such circular, and there was no finding that any purchaser of the bonds had notice of any such circular, or of the facts therein contained. But even if any purchaser of the bonds had seen such circular, it would not have given him notice of any over-issue of bonds, even if there had been any over-issue, and there was not. Said circular does not make any statement as to what was the assessed valuation of the City of Santa Cruz at the time of the issue of the old bonds, nor does it make any statement as to the dates of the issue of the said old bonds, and there is no data furnished in the said circular which would enable any one to arrive at any conclusion as to whether any debt limitation had been exceeded, even supposing any debt limitation had existed, which we deny.

THE CITY OF SANTA CRUZ WAS AUTHORIZED TO ISSUE THESE BONDS BY THE REFUNDING ACT. THAT ACT IS APPLICABLE TO SANTA CRUZ AND IS VALID.—The learned counsel for the defendant, the City of Santa Cruz, also attempted to argue in their brief in the United States Circuit Court of Appeals, that Sections 10 and 12 of the

charter of the City of Santa Cruz (Session Laws of California, 1875–6, pp. 193, 194) provided a limitation upon the indebtedness of the city. Said Sections 10 and 12 are as follows, to wit:

"SEC. 10. The Common Council shall not create, audit or allow, or permit to accrue, any debt or liability above the actual revenue or available means in the treasury, that may be legally apportioned and appropriated for such purpose; nor shall any warrant be drawn, or evidences of indebtedness be issued, unless there shall be sufficient money in the treasury legally applicable to meet the same, except as hereinafter provided."

"SEC. 12. At each regular meeting of the Common Council they shall inquire into the condition of the streets, sewers, bridges, and fire department, and all other property of the city, and whenever the owners of a major part of the taxable property of the city, according to its valuation upon the last preceding assessment roll, shall make written application to the Mayor and Common Council for an expenditure of not exceeding ten thousand dollars for any purpose authorized by this Act, in excess of the revenue of the city for such purpose, in the then fiscal year, the Mayor and Common Council shall have the power, after having caused such application to be spread upon their minutes, to incur such expenditure, although in excess of the revenue of the city for the then current fiscal year, and shall provide for the payment of the same, as directed in said application, by the levy of a special tax for the same or the succeeding fiscal year; *provided*, that the special tax thus to be levied shall, for no one year, be more than one-half of one per cent. upon the valuation of the real and personal property, as shown by the last assessment roll. All special taxes ordered to be levied and collected shall be so levied and collected in the manner, form and ways prescribed for the levying and collecting of the general taxes of said city."

The learned counsel then argue:

"We submit that the charter of the City of Santa Cruz, as enacted in 1876, could not, in the matter of refunding the bonded indebtedness of that city, be

amended by the State Legislature by a general law, unless the City of Santa Cruz should elect to abandon its original charter, and to organize under the general law of the State relating to cities. The new constitution provides for the organization of cities and towns under general laws at the election of the citizens thereof (Const., Art. 11, Sec. 6), and provides that cities organized before the adoption of the Constitution may, *by election*, organize under such general law. The complaint does not show that the City of Santa Cruz ever did elect to organize under any general law," &c., &c.

The learned counsel do not quote the whole of Article XI., Section 6, in support of their proposition of law. If they had, they would have set the matter clear, and would have shown that their proposition is utterly untenable, for that section expressly provides that all cities "shall be subject to and controlled by general laws." The Constitution of the State of California, adopted in 1879, expressly provided (Article XI., Section 6):

"Corporations for municipal purposes shall not be created by special laws; but the Legislature, by general laws, shall provide for the incorporation, organization and classification, in proportion to population, of cities and towns, which laws may be altered, amended, or repealed. Cities and towns heretofore organized or incorporated may become organized under such general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith; and cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this Constitution, shall be subject to and controlled by general laws."

Note the language—"*cities* or towns *heretofore* or hereafter *organized*, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws." In 1894

when the bonds now in question were issued, it was well-settled law in California that under this provision of the state constitution all cities and towns (those organized before 1879, when the constitution was adopted, as well as those organized afterwards) were "subject to and controlled by general laws."

In *Staude vs. Election Commissioners*, 61 Cal., 313 (1882), the Supreme Court of California decided the precise question. The Court held that notwithstanding the charter of the city and county of San Francisco, known as the consolidation act, which was enacted before the adoption of the constitution of 1879, containing the said Article XI., Section 6, above quoted, the legislature of California had the power to pass general laws, and that the city of San Francisco was, under said Article XI., Section 6, of the constitution, subject to and controlled by such general laws. The Court says)p. 319) :

"The question in this case is whether, by virtue of the Act of the Legislature approved March 7, 1881, and commonly known as the 'Hartson Act', an election of the elective officers of the City and County of San Francisco is required to be held at the general election to occur in November of the present year.

That the Legislature intended the provisions of the Act to apply to San Francisco is not denied. Indeed, it could not be successfully denied, for it provides in terms for the election of all elective county, *city and county*, and township officers, with certain enumerated exceptions; and we know, judicially, that San Francisco is the only 'city and county' within the State. The position of the respondents, however, is that the Consolidation Act of that city and county, which provides that the elections therein shall be held in the odd-numbered years, is unaffected by the provisions of the Act in question. And this, it is said, because of the provisions of the Constitution.

By Section 6 of Article XI. of that instrument it is provided that 'corporations for municipal purposes shall

not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization and classification, in proportion to population, of cities and towns, which laws may be altered, amended or repealed.' This provision is clearly prospective. But the framers of the Constitution, recognizing the fact that there were municipal corporations already in existence, provided in the same section as follows: 'Cities and towns heretofore organized or incorporated may become organized under such general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith.' And by the succeeding section the provisions of the Constitution applicable to cities, and, also those applicable to counties, so far as not inconsistent or not prohibited to cities, are made applicable to consolidated city and county governments. If, therefore, the legislature has, by a general law, provided for the incorporation, organization and classification, in proportion to population, of cities and towns, or, if not, whenever it shall do so, the city and county of San Francisco may become organized under such general law whenever a majority of its electors voting at a general election shall so determine, and shall organize in conformity therewith. And until a majority of such electors do so determine, the Consolidation Act of the city and county can not be vacated or abrogated by any general act of incorporation. (*Desmond vs. Dunn*, 55 Cal., 242.) But whether the city and county of San Francisco elects to organize under such general laws or to continue its existence under the Consolidation Act, it is subject to and controlled by general laws; for in the same section of the Constitution, in which the then existing city and town organizations are recognized, and the continuance of their existing charters permitted, it is declared that '*cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this Constitution, shall be subject to and controlled by general laws.*'

See, also, to the same effect:

Thomason vs. Ashworth, 73 Cal., 73.
People vs. Henshaw, 76 Cal., 436.
Davies vs. City of Los Angeles, 86 Cal., 37.

City of Los Angeles vs. Teed, 112 Cal., 319.
Los Angeles vs. Hance, 122 Cal., 77.
Morton vs. Broderick, 118 Cal., 474.
Popper vs. Broderick, 123 Cal., 456.
Fragley vs. Phelan, 126 Cal., 383.
Byrne vs. Drain, 127 Cal., 663.

In City of Los Angeles vs. Teed, 112 Cal., 319, the Supreme Court of California expressly held that the refunding bond act of California, contained in the Political Code, which, by its terms, applied to all cities, was valid, and did apply to all cities, no matter how or when organized. Los Angeles was under a special charter. The court also held that the said refunding act of March 1, 1893, which applied to all cities except those of the first class, was valid, and applied to all cities except those of the first class, no matter how or when organized. The court says (p. 325):

"The effect of these sections [of the Political Code] has not been discussed by counsel, it being apparently assumed on both sides that under the decision in *Ex parte Simpson*, 47 Cal., 127, these sections are not applicable to cities organized before the adoption of the codes. But we think that the rule laid down in that case does not apply to these sections, and that they are applicable to all cities. It is true that they are a part of title III. of part IV. of the Political Code, and that it was held in that case that none of the sections of that title were applicable to any existing city. But the sections now in question were added to the code long after that decision, and it is manifest, from their terms, that they were intended to apply to all cities, without exception. The officers therein mentioned are given designations not corresponding to those used in the 'system or plan under which cities may,' under the preceding sections, 'be organized and governed.' They are designated by general terms, studiously chosen so as to include cities of diverse forms of government,

and organized in a manner different from that provided for in the preceding sections of the title. The language so used unmistakably negatives any intention to confine the operation of those sections to cities organized under the code."

This decision by the Supreme Court of California in the case of *City of Los Angeles vs. Teed*, therefore, completely negatives the proposition stated by the learned counsel for the city of Santa Cruz—namely, the fact that the city of Santa Cruz was organized under a special charter in 1876 rendered it impossible under the constitution of California for the legislature of California to pass any general law respecting the issue of refunding bonds which would apply to the city of Santa Cruz, and authorize the issue of such bonds by that city, notwithstanding any earlier provision in the charter of that city to the contrary. The direct converse of this proposition has been expressly decided in *City of Los Angeles vs. Teed, supra.*

In the case of *Los Angeles vs. Hance*, 122 Cal., 77, the Supreme Court had before it the general act of March 19, 1889, authorizing the issue of improvement bonds, and the court granted a mandamus compelling the city clerk to countersign the said bonds, thus holding the said general act valid and applying to the city of Los Angeles, which city is under a special charter. Millions of improvement bonds have been issued in the state of California by charter cities, under the general improvement bond act of March 19, 1889. Many of these bond issues have been before the Supreme Court of California, and the validity of the said act, as applying to charter cities, has always been upheld.

In November, 1896 (which was *after* the bonds in question were issued), the said Article XI., Section 6, of the constitution, was amended by the insertion of the words "except in municipal affairs," so that the last clause in the said Section 6, since that time, reads as follows:

"Cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this Constitution, *except in municipal affairs*, shall be subject to and controlled by general laws."

This provision has been before the Supreme Court of California in the recent cases above cited of *Morton vs. Broderick*, 118 Cal., 474; *Popper vs. Broderick*, 123 Cal., 456; *Fragley vs. Phelan*, 126 Cal., 383, and *Byrne vs. Drain*, 127 Cal., 663. In all of these cases it is both stated and assumed by the court that, except for the insertion of these new words in 1896 in said Article XI., Section 6, of the constitution—to wit, "except in municipal affairs"—the general laws in question in those cases would concededly and admittedly apply to all cities and towns, according to their terms.

Furthermore, in the case of *Fragley vs. Phelan, supra*, arising under said amendment of 1896, HARRISON, J., in his concurring opinion, stated (p. 395):

"The legislature is vested with the law-making power of the state, and the general laws passed by it have force in all parts of the state, unless, by virtue of some provision in the constitution, such effect is limited, or the law-making power has been lodged elsewhere. A city cannot claim to be exempt from general laws relating to municipal affairs if there is no provision relating to such affairs in the charter under which it is acting, whether such charter is one framed by itself or was given to it by the legislature. If, in framing its charter, its board of freeholders

should make no provision for a public library, or for the improvement of its streets, the general laws upon those subjects would be operative within that city. It is not within the constitutional power of the legislature, by approving a freeholder's charter, which fails to make provision upon subjects pertaining to municipal affairs, to exempt that city from being subject to legislative control in reference to those subjects, nor can the city secure exemption from such control by omitting to make such provision in its charter."

Therefore, even since 1896, cities in the State of California under special charters adopted as prescribed in the constitution can be the subject of general legislation as respects all matters not provided for by such charters. Before 1896, of course, and in 1894, when these bonds were issued, the provisions of the general laws controlled and modified any contrary provisions in the charter of any city (see the cases cited *supra*, p. 233 *et seq.*). The charter of the City of Santa Cruz contained no provision for the issuance of refunding bonds, and even if it had contained such provisions the general refunding bond act of March 1, 1893, would have controlled any such provisions.

There is, therefore, no foundation for the argument of the learned counsel for the City of Santa Cruz that the said refunding bond act of March 1, 1893, did not apply to the City of Santa Cruz.

N.

The election notice was properly published and posted in the present case.

The learned counsel for the City of Santa Cruz, in their brief in the United States Circuit Court of Appeals, undertook to make the argument that, because the election notice was published by the whole ordi-

nance, No. 315, being published (Finding of Fact No. 7, Record, p. 20, and Additional Finding No. 2, Record, pp. 33, 34), instead of the election notice, which was contained in the said ordinance, being published separately, that, therefore, there was no publication of notice as required by law.

This argument is obviously erroneous. The said Ordinance No. 315 set forth the notice of special election in full, and such notice was published in full as a part of said ordinance. See Finding of Fact No. 7, Record, p. 20, and the notice, which is set forth at length in Additional Finding of Fact No. 2, Record, p. 34. The act of March 1, 1893, authorizing these bonds provides (Section 1):

"Said election shall be called and held in the same manner in which other elections are held in such city or town."

The charter of the City of Santa Cruz provides (Session Laws of 1875–6, p. 189), in Section 5 thereof:

"It shall be the duty of the Mayor and Common Council to call all city elections, to designate the time and place of holding the same, giving at least ten days' notice thereof."

Section 1194 of the *Political Code* of California, as amended in 1893, provides for giving notice of elections as follows (Session Laws of California, 1893, pp. 165, 168):

"1194. At least *ten days* before an election to fill any public office, the County Clerk of each County shall cause to be published, in at least two newspapers of general circulation within the county, the nominations to office certified to him by the Secretary of State, and also all those filed with the County Clerk. He shall make not less than two such publications in each of such newspapers before election day, one of

such publications being made upon the last day upon which such newspaper is issued before the day of election. The list of nominations published by the County Clerks of the respective counties shall be arranged in the order and form in which they will be printed upon the ballot. The Clerk or the Secretary of the legislative body of any incorporated *city* or town with whom the names of any candidates have been filed, shall publish in the same manner the lists of nominations filed with him; but where only one newspaper is printed in any county, city, or town, then publication in such newspaper shall be deemed sufficient; and where no newspaper is printed in such county, city, or town, publication shall be made through any newspaper designated by the Board of Supervisors of said county, or the legislative body of such city or town, and by posting copies of the ballot in three of the most public places in such county, city, or town, not less than ten days before the day of election."

The ordinance, No. 315, ordering the giving of notice of the election (Record, p. 34), provides:

"The city clerk is hereby directed and ordered to cause to be published in the 'Santa Cruz Surf' and 'Santa Cruz Daily Sentinel,' newspapers published and printed in said City of Santa Cruz, in the County of Santa Cruz, for not less than ten (10) days before the thirteenth day of March, 1894, a notice of said special election, and to cause to be posted at each place of election hereinafter mentioned, in said city, a notice of said special election," &c.

The court found (Finding of Fact No. 7, Record, p. 20) that notice of election was posted and published for the length of time prescribed in the said ordinance. This giving of notice was obviously sufficient. The fact that the whole ordinance was published, including the notice, instead of having a separate notice prepared and published separately, does not at all invalidate the notice. This very question was before the Supreme Court of California in the case of *Los Angeles*

vs. Teed, 112 Cal., 319, *in which case, also, the whole ordinance was published.* The court says (p. 325):

"Assuming an election by the voters to be necessary, the defendant contends that the ten days' notice of the election was not given as required by law. We do not think this objection well taken. The ordinance was, in terms, a notice of the election, containing everything necessary for such notice."

But even if there had been any irregularity in publishing the entire ordinance containing the notice of election, instead of publishing a separate notice of election, then such irregularity was ratified and cured by Ordinance No. 320, afterwards passed by the mayor and common council.

Neither the constitution of California nor the refunding act of March 1, 1893, nor any provision of the charter of the city of Santa Cruz, nor any general statute, made any provision as to the particular form in which the notice of election should be published and posted. Obviously, therefore, a notice in the form of an ordinance published in full, such as was Ordinance No. 315 (Finding of Fact No. 7, Record, p. 20; Additional Finding of Fact No. 2, Record, p. 32), satisfied the constitution and the statutes and the charter of the city. If any requirement was not satisfied by the publication and posting of the ordinance in full, instead of publication and posting of a separate notice of election, it was at most only the requirement of said Ordinance No. 315, passed by the mayor and common council of the City of Santa Cruz. But, obviously, any failure on the part of the city clerk or other city officer to comply with such requirement, made only by the mayor and common council, could be waived, and the

action of the city clerk or other city officer ratified and cured by subsequent action of the mayor and city council. This is familiar law, on the principle that subsequent ratification is equivalent to original authority. Such subsequent waiver and ratification of what was actually done sufficiently appears in Ordinance No. 320, passed by the mayor and common council of the City of Santa Cruz. The said Ordinance No. 320 (Finding of Fact No. 8, Record, pp. 20, 21) provided for the issue of the bonds, reciting, among other things, that such bonds are issued

"in pursuance of and in conformity with a vote of more than two-thirds of all the qualified electors of said city of Santa Cruz, voting at a special election, duly and legally called and held and conducted in said city as provided under said act, on Tuesday, the thirteenth day of March, 1894, notice thereof having been duly and legally given and published in the manner as required by law."

Therefore, on this record, the only body which, under any construction of the law, had required that a separate notice of election be posted and published, and not merely the ordinance calling the election, has expressly ratified and cured any failure to give such separate notice.

So far as the constitution or statutes of the state or charter of the city required a notice of election, this requirement was satisfied by the publication of the ordinance in full. On this express point see *Los Angeles vs. Teed*, 112 Cal., 319, 325, quoted *supra*.

Furthermore, even if notice of the election had not been properly given, the recitals in the bonds that the election was "duly and legally called and held," and that notice thereof was "duly and legally given and

published in the manner as required by law," are conclusive in favor of the bona fide holder of these bonds, and the city is estopped from making any such defense as that notice was not properly given.

The bonds in question in the present case make the following recital (Record, p. 5)—namely, that they are issued

" in pursuance of and in conformity with the constitution of the State of California, and the ordinances of the city of Santa Cruz, and in pursuance of and in conformity with a vote of more than two-thirds of all the qualified electors of said city of Santa Cruz, voting at a special election *duly and legally called* and held and conducted in said city *as provided under said act*, on Tuesday, the thirteenth day of March, 1894, *notice thereof having been duly and legally given and published in the manner as required by law*, and after the result of said election had been canvassed, found and declared in the manner and as required by law.

And it is hereby certified and declared that all acts, conditions, and things required by law to be done precedent to and in the issue of said bonds, have been properly done, happened, and performed in legal and due form, as required by law."

The cases are numerous in this Court to the effect that a recital like the foregoing in a municipal bond is conclusive in favor of the *bona fide* holder thereof that the election was properly held, and that notice was properly given, and the municipality is estopped to raise any such defense as against the *bona fide* holder.

See the leading case of *Knox County vs. Aspinwall*, 21 How., 539, in which case the attempted defense was the omission to comply with the requirement of the statute in respect of the notices for the election on the question of the issuance of the bonds. This Court held

that the county was estopped from raising any such defense.

See, also, *Humboldt Township vs. Long*, 92 U. S., 642, in which case the act of the Legislature required thirty days' notice, but the election was held within less than thirty days after the date the order provided for holding it, and this Court held the bonds valid in the hands of a *bona fide* holder.

See, also, *Anderson County Commissioners vs. Beal*, 113 U. S., 227, where the defendant offered to prove that notice of election required by law had not been given; and this Court held such evidence not admissible as against a *bona fide* holder of bonds.

See, on the general subject, 1 Dillon on Municipal Corporations, 4th Edition, Sections 520 to 536, and cases there cited.

O.

The requisite majority vote of the electors was had in respect of the present issue of bonds. The objections made by the counsel for the City of Santa Cruz in this respect are wholly without foundation in fact.

The Constitution of the State of California (Article XI., Section 18) provides that indebtedness, beyond the revenue for the year, shall not be incurred by any county, city, town, township, board of education or school district

"without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose."

Under this provision of the Constitution the assent of two-thirds of the qualified electors of the city of

Santa Cruz who voted at the election was sufficient to authorize the issue of the bonds.

The Court found as a fact (Finding of Fact No. 6, Record, p. 19) that

"more than two-thirds of the qualified electors of the said defendant voted in favor of refunding the then outstanding bonded indebtedness," &c.

The Court also found (Additional Finding of Fact No. 2, Record, pp. 32, 33) that

"more than two-thirds of the qualified electors of the said defendant voting at said special election, voted in favor of refunding the then outstanding bonded indebtedness * * * but less than one-half of the qualified electors of said defendant voted at said election."

These findings of fact show conclusively that the above-quoted provision of the constitution of California was strictly complied with as to the two-thirds vote. The constitution does not require a two-thirds vote of *all* the electors in the municipality. It only requires "the assent of two-thirds of the qualified electors thereof, *voting* at an election to be held for that purpose."

Had the constitution read merely "without the assent of two-thirds of the qualified electors thereof" (and not added the words "voting at an election to be held for that purpose," so that it now reads "the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose"), it would still be true, as held in numerous decisions of this court, that two-thirds of the qualified electors of the city of Santa Cruz who voted at the election were sufficient to authorize the issue of the bonds within the meaning of that provision of the constitution.

St. Joseph Township vs. Rogers, 16 Wall., 644.

County of Cass vs. Johnston, 95 U. S., 360.
Carroll County vs. Smith, 111 U. S., 556.
Knox County vs. Ninth National Bank, 147 U. S., 91.
1 *Dillon on Municipal Corporations*, 4th Edition, Section 277, and cases there cited.

The constitution of California, however, *ex industria*, adds the words "voting at an election to be held for that purpose," so that the clause reads "without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose." These words make it perfectly plain that two-thirds of the qualified electors who vote at the election are sufficient; they are put in for this very purpose. There are some decisions in some of the state courts, under constitutions which do not have the words "voting at an election," etc., that the vote of two-thirds, or a majority, of *all* the *persons in a municipality qualified to vote*, whether all vote or not, must be had in order to comply with such provision of a constitution. But in cases where, as in the constitution of California, the words "voting at an election" are added, there is no decision of any court anywhere that two-thirds, or a majority, of *all* the *persons qualified to vote*, is required. Any such decision would obviously be contrary to the very language of the constitutional provision, which requires only two-thirds, or a majority of the voters, "*voting* at an election."

The refunding act of March 1, 1893, authorizing the issue of these bonds, does not expressly state how large a vote shall be required. Of course this statute could not require a smaller vote than is required by the constitution. Inasmuch as the provisions of the constitution have settled how large a vote is required,

a provision on this subject may well have been omitted from this statute.

It is well settled, however, under the general principles of the common law, that, where no express provision is made by a statute, a majority vote of those voting is sufficient (see cases cited *supra*, pp. 246, 247).

In any view, therefore, the provisions both of the constitution of California and of the refunding act as to the requisite majority vote were fully complied with.

But, even if there had been any failure to have the requisite vote of the qualified electors of the city in respect of this issue of bonds, the express recital in the bonds that such vote was had is conclusive in favor of the bona fide holder of these bonds, and estops the city from making any defense that the requisite vote was not had.

The specific recital in the bonds is as follows (Record, p. 5):

This bond is issued "in pursuance of and in conformity with the constitution of the State of California, and the ordinances of the city of Santa Cruz, and in pursuance of and in conformity with a vote of more than two-thirds of all the qualified electors of said city of Santa Cruz, voting at a special election duly and legally called and held and conducted in said city as provided under said act, on Tuesday, the thirteenth day of March, 1894, notice thereof having been duly and legally given and published in the manner as required by law, and after the result of said election had been canvassed, found and declared in the manner and as required by law."

On this point it is enough to cite the following cases:

Commissioners of Knox County vs. Aspinwall, 21 How., 539.

Commissioners vs. Bolles, 94 U. S., 104.

Northern Bank vs. Porter Township, 110 U. S., 608.
Oregon vs. Jennings, 119 U. S., 74.
Chaffee County vs. Potter, 142 U. S., 355.
See, also, the cases cited on this Brief, pp. 244–245.

The learned counsel for the city of Santa Cruz, in their brief in the Circuit Court of Appeals, cite the above-quoted provision of Article XI., Section 18, of the Constitution, which, in the case of the issue of bonds of a municipality, requires "the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose," etc., and which adds, "any indebtedness or liability incurred contrary to this provision shall be void." They state in their brief in the Circuit Court of Appeals (p. 230):

"Our contention is that no recitals can estop the city from pleading and proving irregularities and informalities in an election held for the purpose of overcoming a constitutional inhibition against the incurring of an indebtedness without the assent of a certain proportion of the qualified electors. In such case, the holding of a valid election and the assent of a sufficient number of the qualified electors are jurisdictional, and without them the municipality has no authority to proceed further; and any bond issued by the officers of the municipality thereafter is void, *regardless of its recitals, for want of power to issue it.*"

Similar arguments to this have been urged before this Court in numerous other cases, and this Court has always rejected such arguments, and held that a fact required to exist by the constitution of a State, as well as a fact required to exist by a statute, precedent to the issue of negotiable bonds, can be the subject of a valid recital in such negotiable bonds, which recital will estop the municipality.

Thus, in *Oregon vs. Jennings*, 119 U. S., 74, the Constitution of Illinois, which went into effect August 8, 1870 (Section 12, Article 9), prohibited the issuance of bonds beyond an amount equal to five per centum of the taxable property, and then provided further (119 U. S., 91):

"This section shall not be construed to prevent any county, city, township, school district, or other municipal corporation from issuing their bonds in compliance with any vote of the people which may have been had prior to the adoption of this Constitution, in pursuance of any law providing therefor."

The facts and one of the questions presented in that case are stated by the court as follows (p. 91):

"It appearing that, when the bonds in question in this suit were issued, the debt of the town was already greater than five per centum on the value of its taxable property, as ascertained by the assessment for 1870, it is contended that the bonds could not be lawfully issued, except in compliance with the vote of June 23d, 1870, and in conformity with the conditions imposed by that vote, one of which was the completion and equipment of the first division of the road on or before January 1st, 1871, and that that condition was not observed. *The question is sought to be made one of power* or authority to issue the bonds, within the rules laid down by this court as applicable even in the case of the bonds in the hands of a *bona fide* holder.

At the time the bonds in question were issued, a statute enacted April 16th, 1869, was in force in Illinois, § 7 of which, Gross' Stat., 1869, vol. 1, 3d ed., p. 556, provided that any town should have the right, 'upon making any subscription or donation to any railroad company, to prescribe the conditions upon which such bonds, subscriptions, or donations shall be made, and such *bonds*, subscriptions, or donations *shall not be valid* and binding until such conditions precedent shall have been complied with.'

The language of this statute was as imperative as is that of the Constitution of 1870 in regard to complying with the conditions contained in any vote of the people; and § 6 of the Act of March 30th, 1869, before

cited, prescribes that the proper corporate authorities of the town shall make the donation or subscription, 'as shall be determined at said election.'

In respect to this compliance with the conditions imposed by the vote of the people, *whether the question is to be regarded as arising under the provision of the Constitution* or that of a statute, *it must equally be regarded as concluded by the recital in the bonds*, made by the supervisor and the town clerk."

Note that the constitution of Illinois contained an absolute prohibition against the town's becoming indebted beyond the five per cent. limit, and made an exception of bonds issued "in compliance with any vote of the people which may have been had prior to the adoption of this Constitution in pursuance of any law providing therefor." The law in question "providing therefor" expressly provided that "such bonds, subscriptions, or donations *shall not be valid and binding until such conditions precedent shall have been complied with.*"

The constitution of Illinois, therefore, and the statute to which it referred, expressly prohibited the issue of the bonds in question, and provided that they *should not be valid* until the conditions precedent should have been complied with. This is the same as the constitution of California which provides that "any indebtedness or liability incurred contrary to this provision shall be void." This Court in the case of *Oregon vs. Jennings* said (p. 92):

"In respect to this compliance with the conditions imposed by the vote of the people, whether the question is to be regarded as arising under the provision of the *constitution* or that of a statute, it must equally be regarded as concluded by the recital in the bonds made by the supervisor and the town clerk."

This Court, in *Oregon vs. Jennings*, added (p. 93):

"The provision of § 12 of Article 9 of the Constitution of Illinois did not introduce any new rule of evidence in regard to the mode of proving, in favor of a *bona fide* holder, the compliance with the vote of the people, but left the compliance to be conclusively established in such a case by the recital in the bonds, made by the designated official authorities".

So, in the case of the constitution of California, the constitution does not undertake to deal with any question of how the facts prescribed as conditions precedent shall be proved, but leaves them to be established in the ordinary way; that is, such facts can be established either by showing their actual existence, or by showing that the municipality has, by its findings and recitals in its ordinances and bonds, estopped itself from proving the contrary. That recitals estop a municipality as to a fact required to exist by a *constitution*, as well as to a fact required to exist by a statute precedent to the issuance of negotiable bonds (see *Gunnison County Commissioners vs. Rollins*, 173 U. S., 255; *Chaffee County vs. Potter*, 142 U. S., 355).

In the case of *Gunnison County Commissioners vs. Rollins*, the court, referring to the recitals in the bonds there in question, said (HARLAN, J., p. 263):

"Do such recitals estop the county from asserting against a *bona fide* holder for value that the bonds so issued created an indebtedness in excess of the limit prescribed by the constitution of Colorado? An answer to this question can be found in former decisions of this court. It is necessary to advert to those decisions, particularly those in which the court considered *the effect of recitals importing compliance with constitutional provisions.*"

The court, after stating decisions in previous cases, and particularly that in *Chaffee County vs. Potter*, 142

U. S., 355, which held valid a recital as respects a fact required to exist by the constitution of the state of Colorado, again decided that such a recital of a fact estopped a municipality from showing that the fact recited was untrue.

P.

E. G. & E. Wallace, the assignors of the plaintiff Waite as to certain of the bonds in suit, purchased and paid for said bonds full value in good faith, and had no notice, actual or constructive, that any of the bonds in question were issued to refund $89,000 water company's bonds assumed by the city of Santa Cruz, or of any other facts showing, or tending to show, any illegality in the refunding bonds. The decision of the Circuit Court on this point was correct.

The opinion of the Circuit Court on this point is found in the Record, page 52 *et seq.* The Circuit Court of Appeals did not hold that E. G. & E. Wallace had even any constructive notice except as all holders of these bonds would have constructive notice of what appears on the records of the City Council—a proposition refuted in Point I. of this Brief.

We confine this point to the discussion of the proposition that E. G. & E. Wallace had no notice, actual or constructive, of any illegality or defect in the one hundred and fifty bonds which they purchased. As we shall show, it is distinctly found by the Circuit Court that they paid full value for the bonds purchased, and that they had no actual notice of any

defect or illegality in their issue, and purchased the same in actual good faith, so that the question of actual notice is eliminated from the case.

But it is claimed by the city, *first*, that E. G. & E. Wallace and all other purchasers were bound to examine or take notice of the ordinances—a proposition which we have already refuted in POINT I. of this brief (p. 40, *et seq*).

It is *next* claimed that they had constructive notice through the agency of F. H. Prince & Company. On this point, as stated above, the Circuit Court (DE HAVEN, J.) decided against the city's contention. Circuit Judge GILBERT agreed with the Circuit Court in its judgment that the plaintiff was entitled to recover. Judge ROSS, who gave the opinion of himself and Judge HAWLEY in the Circuit Court of Appeals, did not express any opinion on this point. We make two answers, which are conclusive, to this contention of the city. The only material point of inquiry here is concerning the knowledge or notice which the said E. G. & E. Wallace had in regard to any defect or illegality in the one hundred and fifty Santa Cruz bonds which they purchased and paid for. As to this (the purchase of these bonds by E. G. & E. Wallace), our propositions are :

(1) That the F. H. Prince & Company were not their agents at all, and, if this be true, of course no knowledge which said F. H. Prince & Company actually had, or constructively had, can be imputed to E. G. & E. Wallace, for the plain reason that F. H. Prince & Company were not, in the purchase of these bonds, the agents of the said E. G & E. Wallace, and no constructive notice can arise from an agency which has no existence in point of fact.

(2) The second answer is that even if there was any agency on the part of F. H. Prince & Company for E. G. & E. Wallace in respect of the purchase of these bonds by E. G. & E. Wallace, then, inasmuch as the said F. H. Prince & Company were also acting as agents for Coffin & Stanton, trying to effect a sale of the bonds for them, for which Coffin & Stanton were to pay F. H. Prince & Company a commission, they, the said F. H. Prince & Company, were acting, or attempting to act, on both sides of the transaction where there was an inherent and unavoidable conflict of interest, and, therefore, any knowledge or notice, actual or constructive, which the said F. H. Prince & Company may have had, as to any alleged or supposed defect in these bonds, cannot be imputed as constructive knowledge to E. G. & E. Wallace. We proceed to make good these propositions.

THE SAID E. G. & E. WALLACE PAID FULL VALUE FOR THESE BONDS. The Finding of Fact is (Record, p. 24, Finding No. 12) : That they gave for 150 of the Santa Cruz refunding bonds now in controversy " 435 shares of the stock of the Page Belting Company and $116,400 in cash."

It is not claimed by counsel for the City of Santa Cruz that E. G. & E. Wallace had any *actual* notice that any of the bonds were issued to refund the water company's bonds (even if that fact would make them illegal, which we elsewhere dispute, see this brief, p. 114, *et seq.*). They did not have in their possession, or see, or read any of the ordinances or notice of election, under which the bonds were issued. Nor is it claimed that they otherwise had any *actual* notice or knowledge of any fact that would make the bonds illegal. That they acted in perfect good faith is obvious from the fact that they paid for the bonds $116,400 cash in ad-

dition to the 435 shares of Belting Company stock. It goes without saying that they would not have done this if they had had the least knowledge, or notice, or even suspicion, that there was anything whatever wrong with the bonds.

It is expressly found by the court (Finding of Fact No. 12, Record, p. 24) that

"E. G. & E. Wallace *had no actual knowledge or actual notice of any of said matters, nor actual notice of any fact* tending to impeach the truth of the recitals contained in said bonds."

The said E. G. & E. Wallace had no constructive notice of any facts impeaching the recitals in the bonds through F. H. Prince & Co. or otherwise.

But it is claimed by the counsel for the City of Santa Cruz that E. G. & E. Wallace had *constructive* notice. These bonds, however, are commercial paper, negotiable according to the law merchant; and as we have shown elsewhere in this Brief (p. 92), where it is sought to affect the *bona fide* purchaser for value of negotiable paper with *constructive* notice, the question is not whether there were grounds of suspicion, or even gross negligence on his part, but the question is whether he has *acted in "bad faith."* See the cases to this effect in this court, quoted on this brief (pp. 92-94). There is not in the record a scintilla of anything to charge E. G. & E. Wallace with any "*bad faith.*" As they had no *actual* notice or knowledge, and as they are not chargeable in the least with any "bad faith," there could be no *constructive* notice to them to impeach these negotiable bonds.

The only theory on which the learned counsel for the city of Santa Cruz attempted to show that E. G. & E. Wallace had constructive notice, is as follows:

Coffin & Stanton, of New York, had these refunding bonds for sale, and were offering them for sale through F. H. Prince & Co., a well known firm of bankers and brokers, of Boston, as their (Coffin & Stanton's) agents (Finding of Fact No. 12, Record, p. 24, and Additional Finding of Fact No. 3, Record, p. 39). See, also, testimony of F. H. PRINCE (Record, p. 245) where he testifies:

"I had dealings with the firm of Coffin & Stanton, of New York, in respect to the refunding bonds of the city of Santa Cruz, California. These dealings were as agents for Coffin & Stanton. I sold for Coffin & Stanton 150 bonds to E. G. & E. Wallace. * * * I had been negotiating the sale with Messrs. E. G. & E. Wallace for two or three weeks before the sale was consummated. * * * Coffin & Stanton sent us all the papers relating to the issue of these Santa Cruz refunding bonds and we submitted them to Mr. Dickinson * * *."

When F. H. Prince & Company offered the said bonds to E. G. & E. Wallace, said F. H. Prince & Company submitted to said E. G. & E. Wallace a copy of the opinion of Z. N. Goldsby, city attorney of the city of Santa Cruz in favor of the validity of the bonds (Additional Finding No. 3, Record, p. 39). They also submitted an opinion by Lafayette B. Gleason, the attorney of Coffin & Stanton, addressed to Coffin & Stanton (Additional Finding of Fact No. 3, Record, p. 40). E. G. & E. Wallace (Record, p. 40, Additional Finding No. 3) were not satisfied with these opinions, and asked for the opinion of some attorney practicing law in Boston. "F. H. Prince & Company thereupon suggested that the opinion of M. F. Dickinson, Jr., of

Boston, should be obtained, and F. H. Prince & Company on their own account and for themselves and not acting as the agents of E. G. & E. Wallace employed the said Dickinson to give his opinion in relation to the validity of said bonds, and as the result of such employment and as the attorney of F. H. Prince & Co., Dickinson gave to F. H. Prince & Company the opinion printed below."

Thus the papers regarding these refunding bonds were sent by Coffin & Stanton to F. H. Prince & Co., their agents in the sale of these bonds, and by them submitted to Mr. Dickinson (F. H. Prince & Co.'s attorney) for his opinion. These papers may have included copies of ordinances 314, 315 and 320. (For copies of these ordinances see Record, pp. 26, 33.)

E. G. & E. Wallace never saw these ordinances 314, 315 or 320, and had no actual knowledge or actual notice of them, and the court expressly so finds (Finding of Fact No. 12, Record, p. 24).

The Findings of Fact by the court on this point are as follows (Record, p. 24):

"12. All of the assignors of plaintiff, other than the one referred to in finding No. 3, and E. G. & E. Wallace, who purchased certain of the refunding bonds and coupons sued on under the circumstances hereinafter set forth in this finding, were *bona fide* purchasers of the bonds and coupons assigned by them to plaintiff, and sued on in this action, and were without notice of any fact tending to impeach the truth of the recitals in said bonds; and in relation to E. G. & E. Wallace, from whom plaintiff derives the legal title to the remaining bonds and coupons sued on, the court finds that on or about September 22, 1894, E. G. & E. Wallace, assignors of plaintiff, purchased from Coffin & Stanton 150 of the said bonds and coupons referred to in the preceding finding, including eight of the bonds and coupons sued on in this action, giving in exchange therefor 435 shares of the stock of the

Page Belting Company, and $116,400 in cash. Said purchase and exchange was made by the firm of F. H. Prince & Co., acting as agents of E. G. & E. Wallace, and *also acting for Coffin & Stanton*, in the same transaction. The firm of F. H. Prince & Co. received from E. G. & E. Wallace for services as their agents in effecting the sale of the stock of the Page Belting Company, the sum of two thousand five hundred dollars, and *said Coffin & Stanton agreed to compensate said F. H. Prince & Co. for their services rendered to them* in the same transaction by a division of all profits which should be realized by said Coffin & Stanton, upon the resale of the said shares of stock of the Page Belting Company. At the time of the said sale of the refunding bonds of the defendant city to E. G. & E. Wallace, the said F. H. Prince & Co. had notice of all matters recited in the ordinances of defendant, numbered 314, 315 and 320, hereinbefore referred to in the preceding findings. *The said F. H. Prince & Co. did not communicate their said knowledge to E. G. & E. Wallace, and the said E. G. & E. Wallace had* NO ACTUAL KNOWLEDGE OR ACTUAL NOTICE OF ANY OF SAID MATTERS, NOR ACTUAL NOTICE OF ANY FACT *tending to impeach the truth of the recitals contained in said bonds—and unless the notice to F. H. Prince & Co. is to be imputed as notice to them, the said E. G. & E. Wallace had no constructive notice of the facts recited in said ordinances, or of any fact tending to impeach the truth of the recitals contained in said bonds.*"

And as a conclusion of law the Circuit Court found (Record, p. 25):

"2. That E. G. & E. Wallace were *bona fide* purchasers of the bonds and coupons assigned by them to plaintiff, without notice of the facts recited in the ordinances of the defendant, numbered 314, 315, and 320; and without notice of any fact tending to impeach the truth of the recitals contained in said bonds."

The court afterwards made an Additional Finding as follows (Record, p. 39):

"3. The original finding, No. 12, is amended by adding thereto the following: Prior to the purchase of the bonds by E. G. & E. Wallace, Messrs. F. H. Prince &

Co. submitted to them a copy of the following opinion of Z. N. Goldsby, city attorney of the defendant, practicing law in the city of Santa Cruz, California, namely:

'SANTA CRUZ, CAL., April 25, 1894.

I hereby certify that I have carefully examined all the steps taken and proceedings had relative to the issuance of $360,000, in five per cent. refunding bonds, by the city of Santa Cruz, in the State of California, and the bonds issued pursuant thereto, dated April 16, 1894, and find said proceedings regular, and said bonds legally issued and a valid and binding obligation of said city of Santa Cruz.

Z. N. GOLDSBY.'

And, also, submitted a copy of the following opinion of L. B. Gleason, an attorney-at-law practicing in the city of New York, namely:

'MESSRS. COFFIN & STANTON,
72 Broadway, New York city.

GENTLEMEN: I return you herewith certified copies of the proceedings of the officials of the city of Santa Cruz, Cal., with reference to the issuance of the refunding bonds of said city, bearing date April 16, 1894.

I have made a careful examination of these papers, and of the constitution and statutes of the State of California, with reference to the issuance of refunding bonds by the cities of said State. All the provisions of the constitution and the statutes of the State seem to have been most carefully and fully complied with, and from my examination, I am of the opinion that these bonds are issued in pursuance of the laws relating thereto, and are legal and valid obligations of the said city of Santa Cruz.

Yours truly,
LAFAYETTE B. GLEASON.'

The copies of the opinion of Goldsby and of Gleason were furnished to F. H. Prince & Co. by Messrs. Coffin & Stanton. These opinions were not satisfactory to E. G. & E. Wallace, and they asked for the opinion of some attorney practicing law in the city of Boston. F. H. Prince & Co. thereupon suggested that the opinion of M. F. Dickinson, Jr., an attorney practic-

ing in that city, should be obtained. This suggestion was satisfactory to E. G. & E. Wallace, and it was then agreed between F. H. Prince & Co. and E. G. & E. Wallace that the opinion of said Dickinson upon the question of the validity of said bonds should be obtained by F. H. Prince & Co. F. H. Prince & Co. then, on their own account, and for themselves, and not acting as agents of E. G. & E. Wallace, employed said Dickinson to give his opinion in relation to the validity of such bonds, and, as the result of such employment, and as the attorney of F. H. Prince & Co., Dickinson gave to F. H. Prince & Co. the following opinion, which was afterward by F. H. Prince & Co. submitted to E. G. & E. Wallace prior to their purchase of such bonds:

'BOSTON, August 29, 1894.

F. H. PRINCE & Co.,
2 and 8 State Street, Boston, Mass.:

GENTLEMEN—I have examined the papers that you have submitted in regard to the $360,000 five per cent. refunding bonds of the city of Santa Cruz, Cal., dated April 16, 1894. In my opinion, the bonds are legally issued, in conformity to the laws of the State of California and the ordinances of the city of Santa Cruz, and constitute a legal and valid obligation of said city.

Very respectfully yours,
F. M. DICKINSON, JR.'

Said Dickinson had notice of all the matters recited in the ordinances of the defendant city, numbered 314, 315 and 320, but Dickinson did not communicate his knowledge of said ordinances, or of any of the facts recited therein, to the said firm of E. G. & E. Wallace; *and the said Dickinson, in the examination of said ordinances, and in giving said opinion, was not the agent or attorney of E. G. & E. Wallace, but acted solely as attorney of F. H. Prince & Co.*" (Record, pp. 39-41.)

It was thus both proved by evidence and found by the court that in the sale of these bonds F. H. Prince & Company acted as the agents of Coffin & Stanton, and

not as the agents of E. G. & E. Wallace, and that M. F. Dickinson, Jr., was the attorney for F. H. Prince & Company, and *not* an attorney for E. G. & E. Wallace. Both the evidence and the findings show conclusively that in respect of these bonds Coffin & Stanton and F. H. Prince & Company as their agents, were ranged on one side of the transaction, namely, the side of the vendor, endeavoring to pursuade E. G. & E. Wallace to purchase these bonds, and on the other side of the transaction were E. G. & E. Wallace as vendees acting for themselves, exercising their own discretion and themselves *personally* conducting and consummating the purchase of the bonds (Record, p. 101, 102). As respects these bonds, therefore, F. H. Prince & Company were not the agents of E. G. & E. Wallace, but were on the opposite side of the transaction, and were dealing at arm's length with the said E. G. & E. Wallace.

There were two distinct transactions, or a double transaction. One transaction was that Coffin & Stanton as vendors and F. H. Prince & Company as their agents, both acting on the one side as vendors, sold these Santa Cruz bonds to E. G. & E. Wallace, acting on the other side as vendees. The other transaction was that E. G. & E. Wallace as vendors and F. H. Prince & Company as their agents, both acting on one side of the transaction as vendors, negotiated the sale of the Page Belting Company's stock to Coffin & Stanton as vendees.

As to the question whether or not they should purchase these bonds, E. G. & E. Wallace personally acted for themselves and personally exercised their own discretion, and did not employ any agents for that purpose, or give any authority to any one to act

for them, or to bind them as to such purpose. This fact clearly appears in the testimony, in the written correspondence (Record, pp. 99, 239 and 249), and also in the findings. So, also, on the other hand, as to whether or not they should purchase the belting company's stock, Coffin & Stanton acted for themselves, and did not commit any discretion to F. H. Prince & Company.

F. H. Prince & Company, therefore, were not agents of E. G. & E. Wallace to investigate in regard to the legality of these bonds or to buy them, and any knowledge or notice which F. H. Prince & Company or their attorney Dickinson had cannot be imputed as constructive notice to E. G. & E. Wallace.

It is not enough that there is *an* agency in order that a principal may be affected with *constructive* notice of a fact which the agent may know, or of which he may have notice. There are agencies and agencies. There must be an agency *under and by virtue of which* it is the agent's duty to learn and to communicate to his principal the fact in question.

In the case of *The Distilled Spirits*, 11 Wallace, 356, this Court (Mr. Justice BRADLEY giving the opinion) says (p. 367):

"The general rule that a principal is bound by the knowledge of his agent is based on the principle of law, that it is *the agent's duty* to communicate to his principal the knowledge which he has respecting the subject matter of negotiation, and the presumption that he will perform that duty. *When it is not the agent's duty* to communicate such knowledge, when it would be unlawful for him to do so, as, for example, when it has been acquired confidentially as attorney for a former client in a prior transaction, *the reason of the rule ceases*, and in such a case an agent would not be expected to do that which would involve the betrayal of professional confidence, and his principal

ought not to be bound by his agent's secret and confidential information."

Applying that rule to the present case, it was clearly not the duty of F. H. Prince & Co., who, as agents for Coffin & Stanton, were trying to sell these bonds to E. G. & E. Wallace to investigate the legality of these bonds for E. G. & E. Wallace, or to inform them of any facts which might affect their legality or their value. E. G. & E. Wallace had not employed them for that purpose. On the contrary Coffin & Stanton had employed F. H. Prince & Co. as their agents to sell these bonds, and F. H. Prince & Co. were bound by that contract of agency to endeavor to effect a sale.

It is legally impossible, as will be presently shown, that the same agents should be the agents of the vendors to sell and of the vendees to buy. And in point of fact, F. H. Prince & Co., were not such hybrid and double-headed agents.

The duty and the interest of F. H. Prince & Co. in the matter of the sale of these bonds were with Coffin & Stanton, vendors, and they were not bound by duty or interest to look out for the vendees. Not only so, but E. G. & E. Wallace, as the testimony, correspondence, and findings all show, were engaged in looking out for themselves as vendees, and did not expect F. H. Prince & Co. to look out for them.

There was, therefore, no basis whatever for imputing any knowledge or notice of any fact as to these bonds by F. H. Prince & Co. to E. G. & E. Wallace. There was no agency or duty or confidence under which such notice could be imputed.

From the very nature of agency, F. H. Prince & Co. could not be as to the sale of these bonds agents

for Coffin & Stanton and also for E. G. & E. Wallace, any more than a person can go in opposite directions at the same time. An agency requires that the agent "*act with a sole regard to the interests of his principal*," and a person can not act as agent with sole regard to the interests of both vendor and vendee. "No man can serve two masters whose interests are in conflict."

In *Story on Agency*, 8th Edition, Section 210, the learned author says:

"In this connection, also, it seems proper to state another rule, in regard to the duties of agents, which is of general application, and that is, that in matters touching the agency, agents cannot act, so as to bind their principals, where they have an adverse interest in themselves [citing cases]. This rule is founded upon the plain and obvious consideration, that the principal bargains, in the employment, for the exercise of the disinterested skill, diligence, and zeal of the agent, for his own exclusive benefit. It is a confidence necessarily reposed in the agent, that he will act with *a sole regard to the interests of his principal*, as far as he lawfully may; and, even if impartiality could possibly be presumed on the part of an agent, where his own interests were concerned, that is not what the principal bargains for; and, in many cases, it is the very last thing which would advance his interests. The seller of an estate must be presumed to be desirous of obtaining as high a price as can fairly be obtained therefor; and the purchaser must equally be presumed to desire to buy it for as low a price as he may. * * * * * * * * * * *; it may be correctly said, with reference to Christian morals, that no man can faithfully serve two masters, whose interests are in conflict. If, then, the seller were permitted, as the agent of another, to become the purchaser, his duty to his principal and his own interest would stand in direct opposition to each other; and thus a temptation, perhaps, in many cases, too strong for resistance by men of flexible morals, or hackneyed in the common devices of worldly business, would be held out, which would betray them into gross misconduct, and even into crime. It is to interpose a preventive check against such temptations and seductions, that a posi-

tive prohibition has been found to be the soundest policy, encouraged by the purest precepts of Christianity. * * * * * * * * * * * *

§ 211. Hence, it is well settled (to illustrate the general rule), that an agent, employed to sell, cannot himself become the purchaser; and an agent employed to buy, cannot himself be the seller. [And upon the same principle it is held that a contract made by one who acts as the agent of both parties, may be avoided by either principal.] "

As under this rule F. H. Prince & Co. were not agents of E. G. & E. Wallace as to the sale of these bonds, there was no relation of principal and agent between them from which constructive notice as to these bonds could exist.

In *Mechem on Agency*, Section 723, the author says:

" The rule [as to constructive notice] is based, as has been seen, upon the principle that it is the duty of the agent to communicate to his principal the knowledge possessed by him relating to the subject matter of the agency, and material to the principal's protection and interests. This presumption, however, will not prevail where it is certainly to be expected that the agent will not perform this duty, as where the agent, though nominally acting as such, is in reality acting in his own *or another's interest*, and adversely to that of his principal. Much less will it be entertained where the agent is openly and avowedly acting for himself and not as agent."

In the present case it is clear, and is so expressly found by the Court, that in the sale of these bonds F. H. Prince & Company were " openly and avowedly " acting as agents for Coffin & Stanton, and not as agents of E. G. & E. Wallace. The rule as to constructive notice, therefore, has no application.

This question was fully considered by the Circuit Court. Mr. Justice De Haven, District Judge, said (p. 53):

"To the general rule that notice to an agent while he is engaged in transacting business for his principal, of matters relating to such business, is notice to the principal, there is an exception which is as well settled as the rule itself. The exception is, that when in the transaction of business entrusted to him by his principal, the agent really acts for his own benefit or for the benefit and advantage of the other party to the transaction, notice to him is not deemed constructive notice to his principal. *Benedict* v. *Arnoux*, 154 N. Y., 715; *Dillaway* v. *Butler*, 135 Mass., 479; *De Kay* v. *Hackensack Water Co.*, 38 N. J. Eq., 158. The facts of this case bring it clearly within the exception stated and applied in the cases just cited."

With this view Circuit Judge GILBERT agreed, for he says in his dissenting opinion in the Circuit Court of Appeals that the judgment of the Circuit Court ought to be affirmed (Record, p. 321); and there is no reason to suppose the other two Judges giving the majority opinion held any different view, for they expressly (Record, p. 315), decided the case upon the single proposition, refuted in Point I. of this Brief, that every purchaser of negotiable municipal bonds has constructive notice of the ordinances of a municipality issuing them.

In *Benedict vs. Arnoux*, 154 N. Y., 715 (1898), the facts were (p. 718) that the late Edwin Booth deposited with the firm of Arnoux, Ritch & Woodford, attorneys at law in the city of New York, the sum of $16,500, to be invested for him on bonds and mortgage. The said Arnoux, Ritch & Woodford invested the said moneys in a mortgage made by the defendant George T. Arnoux to Edwin Booth, the said George T. Arnoux being a brother of William H. Arnoux, the latter of whom was one of the firm of Arnoux, Ritch & Woodford (p. 721). The premises on which the said mortgage was made had belonged to the estate of William Campbell, hav-

ing been devised in trust by him, with power of sale, and a sale had been effected under order of the surrogate's court to said George T. Arnoux, and it was claimed, and it was found by the Appellate Division of the Supreme Court of New York, that the conveyance to said George T. Arnoux was in reality a mortgage (the mortgagor being the Campbell estate and others identified with the Campbell estate), although on its terms it was an absolute conveyance. It was further claimed, on the part of the Campbell estate, that inasmuch as said Arnoux, Ritch & Woodford were the agents of said Edwin Booth to invest the said $16,500, and inasmuch as said Arnoux, Ritch & Woodford had actual knowledge of the fact that the conveyance to George T. Arnoux, which was absolute on its face, was, nevertheless, in reality a mortgage, the said Edwin Booth had, as principal, constructive notice of this fact which came to the knowledge of Arnoux, Ritch & Woodford, his agents. This was one of the defenses set up against the foreclosure of the mortgage.

The Court of Appeals of New York, however, held that even assuming that the said conveyance to said George T. Arnoux was in reality a mortgage, yet said Edwin Booth did not have any constructive notice, although his agents to make the said mortgage had actual knowledge of those facts. On this point the Court of Appeals (HAIGHT, J., giving the opinion) said (p. 728):

"It affirmatively appears in the case that Booth knew nothing of the transaction. It is claimed, however, that the knowledge of his agent is imputable to him. This is true to a limited extent; so long as the agent acts within the scope of his employment in good faith, for the interest of his principal, he is presumed to have disclosed to his principal all the facts that come to his knowledge as agent; *but just as soon as the agent forms the purpose of dealing with his principal's*

property for his own benefit and advantage, *or for the benefit and advantage of other persons who are opposed in interest, he ceases in fact to be an agent acting in good faith for the interest of his principal, and his action thereafter based upon such purpose is deemed to be in fraud of the rights of his principal, and the presumption that he has disclosed all the facts that have come to his knowledge no longer prevails.* The citation of authorities to sustain this proposition is hardly necessary, but it may not be out of place to call attention to the case of *Henry* v. *Allen* (151 N. Y., 1), in which this court has recently said: 'The general rule that notice to the agent, while acting within the scope of his authority and in regard to a matter over which his authority extends, is notice to the principal, rests upon the duty of disclosure by the former to the latter of all the material facts coming to his knowledge with reference to the subject of his agency and upon the presumption that he has discharged that duty. *Casco Nat. Bank* v. *Clark*, 139 N. Y., 307, 313; *Hyatt* v. *Clark*, 118 N. Y., 563; *Case of the Distilled Spirits*, 11 Wall. 356, 367.) This presumption, however, does not always arise, for there are several exceptions well recognized by the authorities. Thus, when the agent has no legal right to disclose a fact to his principal, or he is engaged in a scheme to defraud his principal, the presumption does not prevail, because he cannot in reason be presumed to have disclosed that which it was his duty to keep secret, or that which would expose and defeat his fraudulent purpose. (*Innerarity* v. *Merchants' National Bank*, 139 Mass., 332; *S. C.*, 52 Am. Rep. 710; *Weisser* v. *Denison*, 10 N. Y., 68, 76; *Frenkel* v. *Hudson*, 82 Ala. 158; *Western M. & I. Co.* v. *Ganzer*, 63 Fed. Rep., 647; *Hudson* v. *Randolph*, 66 Fed. Rep., 216; *Kettlewell* v. *Watson*, L. R. [21 Ch. Div.] 707; *Cave* v. *Cave*, L. R. [15 Ch. Div.] 639; Mechem on Agency, § 721.)' Mr. Pomeroy says in his work on Equity Jurisprudence: 'When an agent or attorney has in the course of his employment been guilty of an actual fraud, contrived and carried out for his own benefit, by which he intended to defraud, and did defraud his own principal or client, as well as perhaps the other party, and the very perpetration of such fraud involved the necessity of his concealing the facts from his client, then, under such circumstances, the principal is not charged with constructive notice of facts known by the attorney, and thus fraudulently concealed.' (§ 675.)"

Note that in this case the Court of Appeals said (p. 718) that the Special Term (whose judgment the Court of Appeals affirmed, p. 730) had found

" that in the whole of the transactions aforesaid there was *no fraud* or deceit practiced by the said Arnoux, Ritch & Woodford, or any one connected with that firm, on the executors of the last will and testament of the said Campbell; but said executors acted advisedly and with full knowledge and upon their own judgment in making the sale to said George T. Arnoux, and with full knowledge that the said George T. Arnoux borrowed part of the purchase money to pay for the premises from said Booth, and that the mortgage involved in this action was given to secure the amount so borrowed."

There was, therefore, *no actual fraud intended or perpetrated* by the said firm of Arnoux, Ritch & Woodford, and the Court of Appeals does not proceed upon the ground that there was any actual fraud. What the court says is (p. 728), that the action of an agent in such a case " is *deemed* to be in fraud of the rights of his principal." The important thing, and the only important thing, is that the agent by acting for himself or for a third person, as the New York Court of Appeals says, *supra*, " ceases, in fact, to be an agent acting in good faith for the interest of his principal." It matters not that there may be no actual fraudulent intent on the part of the agent. The relation is so inconsistent that the law says the doctrine of *constructive* notice (which depends upon the agent acting *solely in the interest of the principal*) ceases to apply.

A little reflection shows that if this were not the law, then in these days of division of labor and functions, and the multitudes of brokers and bankers, and other agents, and the complexity of interests frequently represented by the same persons or firms, no one would

be safe against a doctrine of imputed or constructive notice through some agency or other, though the person sought to be affected with notice be utterly ignorant of the fact in question, and acting in the utmost good faith, and paying out large sums of money, especially in the case of negotiable securities. If the rule contended for by the learned counsel for the city of Santa Cruz were correct, then no one would dare to buy a negotiable bond of or through a broker without first examining the broker and all his employes, and also examining all the papers that happened to be in the broker's office, or that had passed through the hands of the broker, whether the broker had read them or not, at the peril of being affected with imputed or constructive notice of some facts known to the broker or contained in such papers, if he did not make such examination. Such an absurd and impracticable rule of law does not exist.

In *Dillaway vs. Butler*, 135 Mass., 479, the facts are stated in the head-note as follows:

"A., to whom B. was indebted, advised C. to lend money to B. on the security of a mortgage of personal property, and A. acted as C.'s agent in completing the transaction. With the money thus obtained B. paid A. the debt which he owed him. Both A. and B. acted in fraud of the Gen. Sts. c. 118, §§ 89, 91; but C. had no knowledge of the fraud. Held, that the knowledge of A. was not in law imputable to C."

In this case it will be observed A. attempted to act as a middleman between C. on the one hand and B. on the other. It was urged that the knowledge of A. was, in law, imputable to C., because A. acted as C.'s agent in carrying out the transaction. But the court held that the knowledge was not imputable. The court said (p. 481):

"The agent was not a general agent, nor a solicitor nor attorney of record, but was merely an agent to complete the transaction, which, under his advice, the plaintiff had himself determined upon. There is no presumption that the agent's knowledge was communicated to his principal, and the evidence shows that in fact it was not. See *Wilde* v. *Gibson*, 1 H. L. Cas. 605; *Cave* v. *Cave*, 15 Ch. D. 639."

In *De Kay vs. Hackensack Water Company*, 38 N. J. Eq., 158, the material facts and opinion are stated by the Court as follows (p. 160):

"The right of the fifty-one bonds to participate is denied on the ground that the two banks just named were not *bona fide* holders. It is claimed that when these banks acquired the bonds they were chargeable, in law, with knowledge of the fact which rendered the mortgage invalid. This charge is based on this state of facts: Charles H. Voorhis was the president of the corporation which made the mortgage and issued the bonds; as already stated, he procured the mortgage to be made contrary to law; he was also president of both of the banks, and negotiated the transfer of these bonds from the water company to the banks. Now, if the knowledge which Mr. Voorhis acquired while acting as president of the water company is imputable to to the banks in consequence of his connection with them as president, then it is clear that the banks are chargeable with all that he knew, and that in this controversy they are entitled to no better position, in a legal point of view, than Mr. Voorhis would occupy himself if he were here claiming to recover on these bonds. * * *

"(p. 161). The case against the right of these bonds to participate must stand, if it can stand at all, on the ground that the knowledge which Mr. Voorhis acquired as president of the water company became the knowledge of the banks when he came to act for them as their president in a transaction in which the interest of the banks stood opposed to the interest of the water company. But that is not the position in which the law places two principals represented by the same agent. On the contrary, I understand the law to be that where an agent representing two principals concocts a scheme to defraud one of them for the benefit

of the other, it will be presumed that he did not disclose, to the principal he intended to cheat, the means by which he intended to effect his purpose. This court has decided that where an officer of a corporation deals with the corporation in a matter in which his interest is opposed to the interest of the corporation, he does not, in such transaction, represent the corporation so as to make his knowledge the knowledge of the corporation. *Barnes v. Trenton Gas Light Co., 12 C. E. Gr., 33.* The same principle has been held to apply where two corporations have, in a transaction between them, been, in part at least, represented by the same agent. It appeared in *In re Marseilles Extension Railway Co., L. R. (7 Ch. App.) 161,* that the same person was a director in both the Marseilles Extension Railway Company and the Credit Foncier and Mobilier of England, and that he had borrowed money of the Credit Foncier for the railway company, to 'rig' the market with the stock of the railway company. It was conceded that if the Credit Foncier lent its money to the railway company, knowing that the railway company intended to use the money to "rig" the market with its own stock, the Credit Foncier could not recover. The only attempt made to show such knowledge on the part of the Credit Foncier, was to show that the person who borrowed the money and who constituted part of the managing body of both corporations, knew that the money was to be used for that purpose, but this was held not to be sufficient. Lord Justice JAMES said: 'I cannot understand how a director of a company, going to borrow money from another company, of which he is also a director, can put the company from whom he borrowed it in any different position from that which a joint stock bank would be placed by a director of it asking a loan for himself.' The burden in this case is on the party alleging want of *bona fides*. The mere possession, by an endorsee or assignee, of an instrument possessing negotiable qualities, imports, *prima facie*, that he acquired it *bona fide*, for value, before maturity, and without notice of any fact impeaching its validity. My conclusion is that the banks were *bona fide* holders for value, and consequently that the Hackensack Water Company, re-organized, are entitled to stand in their right."

The learned counsel for the City of Santa Cruz undertook, in the United States Circuit Court of Appeals, to distinguish the case of *De Kay vs. Hackensack Water Company*, on the ground that in that case there was fraud on the part of the agent, or an attempt on his part to defraud, and that in the present case there was no such fraud. It requires but slight consideration to show that there is no such distinction between the two cases. In the case of *De Kay vs. Hackensack Water Company* it was claimed that the Hackensack Water Company bonds were illegal, and that Mr. Voorhis knew that fact. *That was the only "fraud."* So in the present case it is claimed by the learned counsel for the City of Santa Cruz that the Santa Cruz bonds were illegal, and that F. H. Prince & Company, or their attorney M. F. Dickinson, Jr., on seeing the said Ordinances Nos. 314, 315 and 320, knew that they were illegal. If the learned counsel claim anything less than this, obviously the whole foundation for their claim that E. G. & E. Wallace are charged with any notice as to illegality of the bonds is swept away, for certainly if F. H. Prince & Company did not have notice of such illegality from the said Ordinances Nos. 314, 315 and 320, then E. G. & E. Wallace could not, on any theory, have any such notice. The position of the learned counsel for the City of Santa Cruz is this: that F. H. Prince & Company, acting for Coffin & Stanton in trying to sell these bonds, and with notice that these bonds were illegal, effected a sale of the same to E. G. & E. Wallace. It was on precisely these facts, in the case of *De Kay vs. Hackensack Water Company*, that the Court there held that the knowledge of the agent was not constructive knowledge or notice to the vendee.

Of course, the fact that there was *actual* fraud on the part of an agent would not prevent the rule applying that, where an agent assumes to act for himself or for some third person, the doctrine of constructive notice ceases; but actual fraud is not necessary in order that such rule may apply, as the New York case of *Benedict vs. Arnoux*, *supra*, and other authorities abundantly show.

A case directly in point is *Allen v. South Boston Railroad Company*, *Craft v. Same*, 150 Mass., 200 (1889). In the case of Mrs. Craft, the facts were as follows: William Reed was a stock broker in Boston. Mrs. Craft purchased through Reed, as broker, shares of stock of the South Boston Railroad Company. Reed was also treasurer of said South Boston Railroad Company. It turned out afterwards that the president of the railroad company had signed certificates of stock in blank, and left them with Reed, and that Reed had signed a certificate as treasurer and delivered such certificate to Mrs. Craft, under her said purchase, without any old stock having been transferred. This was, therefore, a new issue and an overissue of stock made by the said Reed, who thus committed a fraud upon the South Boston Railroad Company, of which he was the treasurer. Mrs. Craft brought an action against the South Boston Railroad Company, either for damages or to compel the company to cause the shares to be transferred and new certificates issued. The company defended on the ground, among others, that Mrs. Craft, as principal, had constructive notice of what was known to Reed, her broker and agent, and that, therefore, there was to be imputed to her the knowledge of the fact that Reed, in issuing the certificate, was mak-

ing an overissue of stock and cheating the railroad company.

The Supreme Court of Massachusetts held, however, that Mrs. Craft did not have any such constructive notice. On this point the Court (FIELD, J., giving the opinion) said (p. 205):

"In the second case, the plaintiff received from Reed, as broker, a certificate, in her name, of the stock which he said he had bought for her, and there is nothing to show that this was not the usual way in which brokers transacted such business. Apparently Mrs. Craft acted as a purchaser through a broker usually acted, and we see no want of due care on her part.

"Another question arises in her case from the fact that Reed, who committed the fraud upon the defendant, was also her agent in the transaction. If he be regarded as acting in two capacities, and as having committed the fraud in his capacity as treasurer, he yet, as her agent, knew of and participated in it. Is this knowledge to be imputed to her in determining her rights against the defendant?

"The general rule is, that notice to an agent, while acting for his principal, of facts affecting the character of the transaction, is constructive notice to the principal. *Suit v. Woodhall*, 113 Mass., 391. *National Security Bank v. Cushman*, 121 Mass., 490. *Sartwell v. North*, 144 Mass. 188. *The Distilled Spirits*, 11 Wall. 356. There is an exception to this rule when the agent is engaged in committing an independent fraudulent act on his own account, and the facts to be imputed relate to this fraudulent act. It is sometimes said that it cannot be presumed that an agent will communicate to his principal acts of fraud which he has committed on his own account in transacting the business of his principal, and that the doctrine of imputed knowledge rests upon a presumption that an agent will communicate to his principal whatever he knows concerning the business he is engaged in transacting as agent. It may be doubted whether the rule and the exception rest on any such reasons. It has been suggested that the true reason for the exception is that an independent fraud committed by an agent on his own account is *beyond the scope of his employment*, and therefore knowledge of it,

as matter of law, cannot be imputed to the principal and the principal cannot be held responsible for it. On this view, such a fraud bears some analogy to a *tort* wilfully committed by a servant for his own purposes, and not as a means of performing the business intrusted to him by his master. Whatever the reason may be, the exception is well established. *Kennedy v. Green*, 3 Myl. & K. 699. *Espin v. Pemberton*, 3 DeG. & J. 547. *Rolland v. Hart*, L. R. 6 Ch. 678. *In re European Bank*, L. R. 5 Ch. 358. *Cave v. Cave*, 15 Ch. D. 639. *Kettlewell v. Watson*, 21 Ch. D. 685, 707. *Innerarity v. Merchants' National Bank*, 139 Mass. 332. *Dillaway v. Butler*, 135 Mass. 479. *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268. *Howe v. Newmarch*, 12 Allen, 49.

This case seems to us to fall within this exception. *Although the fraudulent act of Reed may not have been committed with the intention of cheating the plaintiff, yet that was its legal effect*, and it was a fraudulent act committed by him for his own benefit, the actual effect of which would have been wholly to avoid the transaction if the plaintiff had known of it.

The present cases, we think, fall within the principle, that, where one or two innocent persons must suffer a loss from the fraud of a third, the loss must be borne by him whose negligence enabled the third person to commit the fraud.

The defendant cannot be compelled to issue new certificates, or to recognize the old ones as valid, because to do so would cause an over-issue of its capital stock, but it is liable in damages."

Note that in this case there was no evidence that Reed intended to defraud Mrs. Craft any more than there is evidence in the present case that F. H. Prince & Company, or their attorney, M. F. Dickinson, Jr., intended to defraud E. G. & E. Wallace. In Mrs. Craft's case, the court said (p. 206):

"Although the fraudulent act of Reed may not have been committed with the intention of cheating the plaintiff, yet that was its legal effect, and it was a fraudulent act committed by him for his own benefit, the actual effect of which would have been wholly to avoid the transaction if the plaintiff had known of it."

So, in the present case, on the theory advanced by the learned counsel for the city of Santa Cruz, if F. H. Prince & Company, or M. F. Dickinson, Jr., their attorney, had notified E. G. & E. Wallace of the contents of the ordinances, Nos. 314 and 315, the actual effect of such notification would have been to render these refunding bonds void in their hands. Their not giving such notification to E. G. & E. Wallace was, therefore, in the view presented by the learned counsel for the city of Santa Cruz, a fraud upon E. G. & E. Wallace. They might not have intended to cheat E. G. & E. Wallace, but, in the language of the Supreme Court of Massachusetts, above quoted, "that was its legal effect," if the theory of the counsel for the city of Santa Cruz be correct.

There is a large number of cases in which the courts have held that where the agent has ceased to act, in the language of Story (see *Story on Agency*, quoted *supra*, p. 265), "*with a sole regard to the interests of his principal*," either by acting for some third person or by acting for himself, then, as the agency has, *pro tanto*, ceased, the doctrine of constructive notice does not apply. Any agent who thus acts for and in the interest of a third person, or for and in his own interest, instead of for and in the interest of his principal, is guilty of a fraud upon his principal. Some of the cases have been cases of glaring fraud on the part of the agent, but the extent and nature of the fraud are immaterial. The one essential fact as stated in the opinion of the Court of Appeals of New York, in *Benedict vs. Arnoux*, 154 N. Y., 715, *supra*, is that the agent "ceases in fact to be an agent acting in good faith for the interest of his principal." The important point is that in such a case the relation of confidence

and trust which the principal has reposed in the agent, and which make it the duty of the agent to communicate to the principal the facts which come to his knowledge, has been broken off by the act of the agent in assuming a relation either to the interests of some third person or to his own interests, which makes it impossible for that relation with his principal any longer to exist. In the language of Mr. Justice STORY *(Story on Agency*, quoted *supra*, p. 265*)*: "No man can faithfully serve two masters whose interests are in conflict." It is the breaking off of this relation of confidence and trust with the principal, which in effect breaks off the agency, that makes the doctrine of constructive notice cease to have any application. It is immaterial whether, when this agency is broken off, it is done for the purpose of the agent's committing some glaring fraud upon his principal, although that is, perhaps, the most frequent case. The only material thing is that the agency and the relation of trust and confidence no longer exist.

The principles here stated have been applied in many cases, and they are the principles that run uniformly through this line of cases. These are the principles that explain all of the cases, although the cases vary as to their particular facts. It is necessary, of course, in any case to look at the particular facts, including among others the nature and extent of the particular agency.

This Court, in the recent case of *American Surety Company vs. Pauly* (No. 1), 170 U. S., 133 (1898), considered and decided the question here presented in accordance with the propositions and views stated in this brief. One Collins, president of the California National Bank of San Diego, California, signed a cer-

tificate (p. 135) as to the good character of O'Brien, an employe of the bank, who was, or was to become cashier of the bank. This certificate accompanied the application of said O'Brien to obtain a bond of the American Surety Company for faithful performance of his duties as cashier of said bank. The bond contained provisions requiring the employer to give notice of any act on the part of the employe which might involve a loss, etc. (p. 136). Afterwards said O'Brien assisted the said Collins in making embezzlements from the said bank. The surety company was sued upon the bond, and, among other defenses, it set up that the bond was void by reason of fraudulent misrepresentations and concealments of Collins, acting as the president of the bank (p. 149). It was urged in support of such defense that Collins, being president of the bank, and an agent of the bank, had knowledge of O'Brien's dishonesty, therefore the bank had constructive notice of O'Brien's dishonesty. On this point this Court (Mr. Justice HARLAN giving the opinion) said (p. 156):

"It must therefore be taken, as between the bank and the company, that the former cannot be deemed, merely by reason of Collins' relation to it, to have had constructive notice that he, as president, gave the certificate in question.

The presumption that the agent informed his principal of that which his duty and the interests of his principal required him to communicate does not arise where the agent acts or makes declarations *not in execution of any duty that he owes to the principal, nor within any authority possessed by him*, but to subserve simply his own personal ends or to commit some fraud against the principal. In such cases the principal is not bound by the acts or declarations of the agent unless it be proved that he had at the time actual notice of them, or having received notice of them, failed to disavow what was assumed to be said and done in his behalf.

In *Henry v. Allen*, 151 N. Y. 1, 10, the court recognized the general rule. But after observing that it

rested upon the agent's duty to disclose such facts to his principal, it held that one of the exceptions was that where the agent was 'engaged in a scheme to defraud his principal, the presumption does not prevail, because he cannot in reason be presumed to have disclosed that which it was his duty to keep secret, or that which would expose and defeat his fraudulent purpose.'

To the same effect are *Benedict* v. *Arnoux*, 154 N. Y. 715, and *Kettlewell* v. *Watson*, 21 Ch. Div. 685, 707. In the latter case it was said that the presumption arising from the duty of the agent to communicate what he knows to his principal 'may be repelled by showing that, whilst he was acting as agent *he was also acting in another character*, viz., as a party to a scheme or design of fraud, and that the knowledge which he attained was attained by him in the latter character, and that therefore there is no ground on which you can presume that the duty of an agent was performed by the person who filled that double character.'

In *Commercial Bank* v. *Cunningham*, 24 Pick. 270, 276, which involved the question whether certain notes held by a bank were to be deemed to have been made for the accommodation of a firm, one member of which was a director of the bank at the time the notes were taken, it was held that the knowledge of the latter, although a director, was no proof of notice to the corporation, 'especially as he was a party to all these contracts, *whose interests might be opposed to that of the corporation.*' This principle is reaffirmed in *Innerarity* v. *Merchants' National Bank*, 139 Mass. 332, 333, in which the court said: 'While the knowledge of an agent is ordinarily to be imputed to the principal, it would appear now to be well established that there is an exception to the construction or imputation of notice from the agent to the principal in case of *such conduct by the agent as raises a clear presumption that he would not communicate the fact in controversy*, as where the communication of such a fact would necessarily prevent the consummation of a fraudulent scheme which the agent was engaged in perpetrating'—citing *Kennedy* v. *Green*, 3 Myl. & K. 699; *Cave* v. *Cave*, 15 Ch. D. 639; *In re European Bank*, L. R. 5 Ch. App. 358; *In re Marseilles Extension Railway*, L. R. 7 Ch. App. 161; *Atlantic National Bank* v. *Harris*, 118 Mass. 147; *Loring* v. *Brodie*, 134 Mass. 453.

In *Terrell* v. *Branch Bank of Mobile*, 12 Alabama, 502, 507, the question was as to the liability of the maker of a note executed in blank and delivered by him to a director of a bank to be filled up with a certain sum, and to be used in the renewal of a note of the maker already held by the bank. The director (Scott) filled up the note for a larger amount and had it discounted for his own use, he acting as one of the directors when the discount occurred, but concealing the facts from the other directors. It was contended that the knowledge of Scott as director of the circumstances under which the note was made and offered for discount, his connection with the directory, and his presence when it was discounted by the bank, were in law a notice to the other directors of the facts. The Supreme Court of Alabama said: 'It cannot be admitted that in receiving the blank of the defendant to be used for his benefit, Scott acted as the agent of the bank; and certainly he did not thus act in abusing the authority conferred on him by the defendant. But in filling up the blank for a larger amount than his authority required, and then offering the note for discount, he was in reality the representative of his own interest. *Pro re nata*, his powers as a director were suspended —he was contracting with the bank through his associates in the directory—he was borrowing, not lending its money—though a member of the board and present too, it cannot be supposed that he coöperated with them in purchasing paper of which he was the avowed proprietor; and whether he did or not, it cannot be presumed that he made any disclosure which would prejudice his application for a loan.'

"In his treatise on Equity Jurisprudence, Pomeroy says: 'It is now settled by a series of decisions possessing the highest authority that when an agent or attorney has, in the course of his employment, been guilty of an actual fraud contrived and carried out for his own benefit, by which he intended to defraud and did defraud his own principal or client, as well as perhaps the other party, and the very perpetration of such fraud involved the necessity of his concealing the facts from his own client, then under such circumstances the principal is not charged with constructive notice of facts known by the attorney and thus fraudulently concealed.' Vol. 2, § 675.

"Further citation of authorities would seem to be unnecessary to support the proposition that if Collins

gave the certificate that he might, with the aid of O'Brien as cashier, carry out his purpose to defraud the bank for his personal benefit, the law will not presume that he communicated to the bank what he had done in order to promote the scheme devised by him in hostility to its interests."

In the case of *Innerarity vs. Merchants' National Bank*, 139 Mass., 332, the plaintiffs had shipped a cargo of sugar to one Burgess, accompanied by a bill of lading, consigned to said Burgess and shipped to Burgess' order. Burgess had possession of the bill of lading, with authority to sell the sugar. Instead of selling it, Burgess pledged the sugar and delivered the bill of lading to the Merchants' National Bank for a loan of $43,000. Burgess was a director of the bank, and was present when the loan was approved. It was admitted that the pledge was good, unless the bank was affected with the knowledge of Burgess, its director. The Court held that the bank was not thus affected with notice. On this point the court said (p. 333):

"While the knowledge of an agent is ordinarily to be imputed to the principal, it would appear now to be well established that there is an exception to the construction or imputation of notice from the agent to the principal in case of such conduct by the agent as raises a clear presumption that he would not communicate the fact in controversy, as where the communication of such a fact would necessarily prevent the consummation of a fraudulent scheme which the agent was engaged in perpetrating. *Kennedy* v. *Green*, 3 Myl. & K. 699. *Cave* v. *Cave*, 15 Ch. D. 639. *In re European Bank*, L. R. 5 Ch. 358. *In re Marseilles Extension Railway*, L. R. 7 Ch. 161. *Atlantic National Bank* v. *Harris*, 118 Mass. 147. *Loring* v. *Brodie*, 134 Mass., 453.

One of the most recent cases on this point is *Dillaway* v. *Butler*, 135 Mass. 479. A., to whom B. was indebted, advised C to lend money to B. on the security of a mortgage of personal property, and acted

as C.'s agent in completing the transaction. With the money thus obtained B. paid A. the debt he owed him. Both A. and B. acted in fraud of the Gen. Sts. *c.* 118, §§ 89, 91; but C. had no knowledge of the fraud. It was held that the knowledge of A. was not in law imputable to C., although A. had acted for C. in the negotiation.

* * * * * *

The proposition, that a director of a corporation acting avowedly for himself, or on behalf of another with whom he is interested in any transaction, cannot be treated as the agent of the corporation therein, is well sustained by authority. *Stratton* v. *Allen*, 1 C. E. Green, 229. *Barnes* v. *Trenton Gas Light Co.* 12 C. E. Green, 33. *Hightstown Bank* v. *Christopher*, 11 Vroom, 435. *Winchester* v. *Baltimore & Susquehanna Railroad*, 4 Md. 231. *Wickersham* v. *Chicago Zinc Co.* 18 Kansas, 41. *Seneca County Bank* v. *Neass*, 5 Denio, 329, 337. *Third National Bank* v. *Harrison*, 10 Fed. Rep. 243. *Stevenson* v. *Bay City*, 26 Mich. 44. *In re Marseilles Extension Railway, ubi supra. In re European Bank, ubi supra.*"

In *Frenkel vs. Hudson*, 82 Ala., 158 (s. c., 2 Southern Reporter, 758), the Court sufficiently states the facts in the decision as follows (p. 160):

"The appellee Frenkel, as assignee of the Citizens' Mutual Insurance Company, an insolvent corporation, filed the present bill against the appellant Hudson, who is assignee of the Point Clear Improvement Company, also an insolvent corporation, and other defendants, to compel specific performance of an alleged agreement to execute a mortgage to secure the purchase-money of certain real estate conveyed by the complainant insurance company, in February, 1885, to the defendant Adams, and by the latter to the defendant corporation, the Point Clear Improvement Company. A second aspect of the bill, claiming a vendor's lien on the same property, having been abandoned as untenable, need not be noticed in this discussion.

The main issue, in our opinion, upon which the decision of the cause must turn, is, whether the Point Clear Improvement Company, to which Adams conveyed the land, can be regarded as a *bona fide* purchaser for value, without notice of the latent equity sought to

be fastened on the property in the present bill. The chancellor decided that the company, as vendee, was chargeable with such notice, and this finding is before us for review.

* * * * * *

(p. 162) 2. We next inquire whether the vendee of this property, the Point Clear Improvement Company, is chargeable with notice of Adams' defect of title. Did it have notice of the fact that he acquired title under an agreement of Goelet to execute the mortgage described in the bill? The corporation was organized for the purpose of carrying on a hotel business, and other enterprises collateral to this object. It was an artificial person, entirely separate and distinct from the natural persons owning shares of its capital stock. And this capital stock was a trust fund to be preserved for the primary benefit of the corporate creditors,—a principle which has a potential bearing, as here, in the case of insolvent corporations.—*Glenn* v. *Semple*, 80 Ala. 159. It nowhere appears that the board of directors, or corporate managers of the company, had knowledge of any facts sufficient to put them on inquiry as to the existence of this equity. The only mode in which it is sought to bring home notice to the company is through its president, Goelet, who had actual knowledge of the alleged agreement; and it is insisted that the knowledge of the agent must be imputed to the principal. The general rule is, that notice of a fact acquired by an agent, while transacting the business of his principal, operates constructively as notice to the principal. This rule applies, of course, as well to corporations as to natural persons.—*Reid* v. *Bank of Mobile*, 70 Ala. 199. *It is based upon the principle, that it is the duty of the agent to act for his principal upon such notice*, or to communicate the information obtained by him to his principal, so as to enable the latter to act on it. *It has no application, however, to a case where the agent acts for himself, in his own interest, and adversely to that of the principal.* His adversary character and antagonistic interests take him out of the operation of the general rule, for two reasons: *first*, that he will very likely, in such case, act for himself, rather than for his principal; and, *secondly*, he will not be likely to communicate to the principal a fact which he is interested in concealing. It would be both unjust and unreasonable to impute notice by mere construction under such circumstances, and such is the es-

stablished rule of law on this subject.—*Terrell* v. *Branch Bank of Mobile*, 12 Ala. 502; *Lucas* v. *Bank of Darien*, 2 Stew. 321; *Wickersham* v. *Chicago Zinc Company*, (18 Kan. 481), 26 Amer. Rep. 784; Angell & Ames on Corp., §§ 308, 309; Story on Agency, § 140.

The testimony satisfies us that Goelet bought the land from the Citizens' Mutual Insurance Company for himself, at one price, and sold it at another to the Point Clear Improvement Company, in payment of a debt due for stock subscription. The contention that he bought for the defendant company is not sustained by the record. In making the sale, therefore, through Adams, he was acting for himself, in his own interest, and in an adversary character. It is not to be supposed that he communicated his knowledge of the alleged equity to his vendee, by informing its board of directors, or other managing officers, of the existence of such a prejudicial fact. His own knowledge, as president of the company, was insufficient to charge the company in its corporate capacity with notice.

The decree of the chancellor, being opposed to these views, is reversed; and a decree will be rendered in this court, adjudging the complainant not to be entitled to the relief prayed, and dismissing his bill."

First National Bank vs. Foote, 12 Utah, 157 (s. c., Pacific Reporter, 205), was an action on a promissory note. Hague, the cashier of the bank, was interested, with certain other persons, in having the bank take the note for the money which the bank had advanced. He, with the defendant Foote, and others, had signed the note, and had represented to said Foote and others that one Whitmore would join in signing it, and had represented to them that the note was not to be delivered to the bank until signed by Whitmore. It was claimed that the knowledge of said Hague, cashier of the bank, that the note was not to become effective until signed by said Whitmore, was to be imputed to the bank, and hence, that the bank could not recover on the note. The court, however, held that such

knowledge was not to be imputed to the bank. On this point the court said (p. 168):

"3. The third question is the one most argued and relied on by appellants. Their position is that the agreement between Hague and the appellants was that the note was not to become complete until signed by Whitmore; that the bank took it charged with Hague's knowledge of this agreement; that, even if respondent was not bound by Hague's representations, because of his individual interest in the transaction when the note was received, Hague's knowledge is to be imputed to it; that, even if this be not so, the note having been delivered in violation of the condition that Whitmore should sign, it devolved upon the respondent to show that it was a holder in good faith, for value, without notice of the note's infirmity. The general rule is well established that a principal is bound by the representations of his agent, made in the transaction of the principal's business, within the real or apparent scope of his authority, and that the knowledge of the agent concerning the business which he is transacting for his principal is to be imputed to his principal. There are, however, exceptions to the general rule no less well established. *No person can act as an agent in regard to a contract in which he has any interest*, or *in which he is a party on the opposite side to his principal.* 2 Daniel, Neg. Inst. § 1611; Story, Ag. § 210; *Claflin* v. *Bank*, 25 N. Y. 293; *Voltz* v. *Blackmar*, 64 N. Y. 440; *West St. Louis Sav. Bank* v. *Shawnee Co. Bank*, 95 U. S. 557. In the case at bar, Hague, although cashier of the respondent bank, and empowered to represent it, and speak for it generally in such transactions, was himself a party to the note on the side opposite to respondent. If it should be held that he represented and spoke for the bank in that transaction, as its agent, he would be permitted to occupy exactly that adverse and inconsistent relation which the law forbids. He had no power or authority to act or speak for the respondent in that matter. He stood upon one side, with his co-makers, the appellants, and the bank stood upon the other side. *They dealt with each other, not as principal and agent, but as payor and payee, representing adverse interests, and occupying adverse positions.* In such a case the representations of Hague to his comakers were not binding on the bank, and his knowledge of such representations could not be imputed to the bank without

violating rules of law well settled both upon principle and authority. *Innerarity* v. *Bank*, 139 Mass. 334, 1 N. E. 282; Mechem, Ag. §§ 723, 729; *Frenkel* v. *Hudson* (Ala.) 2 South. 758; *Wickersham* v. *Zinc Co.*, 26 Am. Rep. 786.

In *Kettlewell vs. Watson*, 21 Ch. Div., 685 (cited by Mr. Justice HARLAN, *supra*, p. 281), the facts were (page 687): Richardson & Watson were land and estate agents. They granted certain land to the defendant William Watson (p. 688). He did not employ any solicitor in the matter, but he allowed Richardson & Watson, at their suggestion, to employ their own solicitor to prepare the conveyance for him. He had no actual notice of the plaintiffs' lien (vendor's lien for the purchase money) and he made no inquiries about the title or the deeds, nor did he search the register. Richardson & Watson knew of the vendor's lien. In fact (p. 687), the £1,500 of the purchase money for which the vendor's lien existed was due from Richardson & Watson. It was claimed that Richardson & Watson were the agents of William Watson, and the knowledge of Richardson & Watson was imputed to William Watson. The court held, however, that although they were agents, the mere fact that they were agents was not sufficient to cause notice to be imputed. On this point the court (FRY, J.,) said (p. 707):

"The first Defendant is *William Watson*. He purchased a small lot, which was conveyed to him by a deed of the 16th of January, 1873. He employed *Richardson & Watson* more or less as his agents. His own evidence was of a vague and general description, and, if it had stood alone, would, I think, have imported the employment of those persons as his general agents in the matter. But, when I refer to the letters which passed at the time, as well as to the statements made by him in his answer to interrogatories, I have come to the conclusion that his employment of *Rich-*

ardson & Watson was only to prepare the conveyance to him, and that they were not general agents as was the case in *Brotherton v. Hatt. Richardson & Watson*, therefore, were not under any obligation from that mere agency to disclose the vendor's lien to *William Watson.*"

Note that this case was not put on the ground that Richardson & Watson undertook to defraud William Watson, but on the ground that the agency of Richardson & Watson was a limited agency only, and that they were not under any obligation from that mere agency to disclose the vendor's lien.

In *Cave vs. Cave*, 15 Ch. Div., 639, a solicitor used trust funds in purchasing property in the name of his brother. The property was then mortgaged to one Chaplin, who employed said solicitor to act for him in taking the mortgage. It was claimed that the knowledge of the solicitor was to be imputed to Chaplin, the mortgagee. The court, however, held that it was not. FRY, J., giving the opinion, said (p. 643):

"There is undoubtedly an exception to the construction or imputation of notice from the agent to the principal, that exception arising *in the case of such conduct by the agent as raises a conclusive presumption that he would not communicate the fact in controversy.* This exception has been put in two ways. In the very well-known case of *Rolland* v. *Hart*, Lord HATHERLEY put it substantially in this way, that you must look at the circumstances of the case, and inquire whether the Court can see that the solicitor intended a fraud, which would require the suppression of the knowledge of the incumbrance from the person upon whom he was committing the fraud. In *Thompson* v. *Cartwright*, the late Master of the Rolls put it rather differently, and it would appear that in his view you must inquire whether there are such circumstances in the case, independently of the fact under inquiry, as to raise an inevitable conclusion that the notice had not been communicated. In the one view notice is not imputed, because the circumstances are such as

not to raise the conclusion of law, which does ordinarily arise from the mere existence of notice to the agent; in the other view—that of Lord CHELMSFORD and Lord HATHERLEY—*the act done by the agent is such as cannot be said to be done by him in his character of agent*, but is done by him in the character of a party to an independent fraud on his principal, and that is not to be imputed to the principal as an act done by his agent.

"Those being the principles applicable to the decision of this case, I must ask myself what are the circumstances."

The court then proceeds to consider the particular facts in that case, and concludes that the notice was not imputed to Chaplin.

In re Marseilles Extension Railway Company, ex parte Credit Foncier and Mobilier of England, 7 Ch. App., 161. In this case Mr. Newbon, who was a director in both companies, and Mr. Heritage, who was a solicitor for both companies, went to the Credit Foncier for the purpose of negotiating a loan to the Marseilles Company, the purpose of the loan being to enable the Marseilles Company to buy, through a Mr. Bowles, its own stock in the market, with the view to keeping up the price of it, which was not permitted by the charter of the company, and both Mr. Newbon and Mr. Heritage had knowledge of this purpose. It was claimed that, inasmuch as Mr. Newbon and Mr. Heritage had knowledge of the purpose for which the money was to be used, and as they were director and solicitor of the Credit Foncier as well as of the Marseilles Company, therefore the Credit Foncier had imputed notice of the unlawful purpose to which the money was to be applied. The Court, however (Sir G. MELLISH, L. J.), said on this point (p. 168):

"I cannot think that because he [Newbon] was a common director to the two companies, we are on that

account to say that the one company has necessarily notice of everything that is within the knowledge of the common director, and which knowledge he has acquired as director of the other company."

In regard to the knowledge of Mr. Heritage, the common solicitor, the Court said (p. 169):

"He went with Mr. *Newbon* to negotiate the loan. That loan was only negotiated with Mr. *Grant*, the managing director of the *Credit Foncier*, and it was brought before the board of the *Credit Foncier*, and the board as a board came to the resolution to make the loan, not, as far as appears, consulting Mr. *Heritage*, or employing him at all as their solicitor in the matter, but acting as commercial men upon their own discretion. No doubt it may have been part of the terms that there should be a mortgage, and Mr. *Heritage* may have been employed as their solicitor to draw up the mortgage deed. But I cannot think that is sufficient to affect the *Credit Foncier* with notice of any improper mode in which this money was to be expended, even if Mr. *Heritage* had, which I cannot see that there is any evidence that he had, notice that it was to be expended for an improper purpose.

"After all, the real question is, which of two innocent sets of shareholders is to bear this loss? It appears to me that if the directors of the *Marseilles Company* have been guilty of an improper application of the funds of the *Marseilles Company*, it would be more just that the shareholders of the *Marseilles Company*, whose directors improperly applied this money, should bear the loss, than the innocent shareholders of the *Credit Foncier*, whose directors appear to have done what it was a perfectly legitimate thing for them to do; it being a part of their business to lend money, and the other company having power to borrow it."

Sir WILLIAM JAMES, L. J., in giving his opinion, says (p. 170):

"I am of the same opinion. I desire only to add this: I can not understand how a director of a company going to borrow money from another company can put the company from whom he borrows it in any different position from that in which a joint stock bank would be placed by a director of it asking a loan for

himself. Is it to be imputed to the banking company that they have knowledge of everything the director knows about his own private affairs? Such a proposition seems to be most unreasonable."

In *re European Bank, ex parte Oriental Commercial Bank*, 5 Ch. App., 358, Demetrio Pappa, as an individual, sold certain negotiable bills to the Eastern Commercial Bank, of which he was managing director. The money to pay for such bills belonged to another bank, to wit, the Oriental Commercial Bank, which fact Demetrio Pappa knew. It was claimed that this knowledge of Demetrio Pappa was to be imputed to the Eastern Commercial Bank, of which he was an agent as managing director. The Court (Sir G. M. GIFFARD, L. J.), giving the opinion, said (p. 361):

"Is then the *Eastern Commercial Bank* in any better position than *Demetrio Pappa* would have been? In my opinion they were not affected with notice through *Demetrio Pappa*. He purchased the bills before the *Eastern Commercial Bank* was formed. He stood in relation of vendor to that bank, and though he was managing director and something more, and paid himself by cheque, he is not in the position of a partner in an ordinary firm, but of agent acting for the bank as principal. He cannot be taken to have disclosed his own fraud: *Kennedy vs. Green* therefore applies."

In *Arden vs. Arden*, 29 Ch. Div., 702, it was claimed that notice to solicitors of trustees (of incumbrances upon equitable interests) was notice to the trustees for whom they were solicitors. The Court, however, held that the agency of these solicitors did not extend to receiving notices of the incumbrances, KAY, J., saying (p. 709):

"I do not think that Messrs. *Johnson*, although solicitors for the trustees, were their agents to receive notice of incumbrances."

The case of *Bradley vs. Riches*, 9 Ch. Div., 189, and the case of *Rolland vs. Hart*, 6 Ch. App., 681, are cases of solicitors employed by clients *expressly to look up the title to certain real estate.* It was, therefore, within the scope of their employment, and was their duty to examine the title, and if they discovered anything wrong with it to communicate that fact to their clients. It is on this express ground that those cases were decided. FRY, J., giving the opinion in *Bradley vs. Riches*, says (p. 196):

"In the next place he [Riches] was solicitor for *Woodman* in the matter of the mortgage of 1875, and he was bound by his duty as solicitor to communicate anything and everything that was material for *Woodman* to know."

So, also, Lord HATHERLEY, in the case of *Rolland vs. Hart*, *supra*, says (p. 681):

"It has been held over and over again that notice to a solicitor *of a transaction, and about a matter as to which it is part of his duty to inform himself*, is actual notice to the client. Mankind would not be safe if it were held that, under such circumstances, a man has not notice of that which his agent has actual notice of. The purchaser of an estate has, in ordinary cases, no personal knowledge of the title, but employs a solicitor, and can never be allowed to say that he knew nothing of some prior incumbrance because he was not told of it by his solicitor.

It cannot be left to the possibility or the impossibility of the man who seeks to affect you with notice being able to prove that your solicitor did his duty in communicating to you that which, according to the terms of your employment of him, was the very thing which you employed him to ascertain."

Facts in the present case show that F. H. Prince & Company were not the agents of E. G. & E. Wallace to purchase these bonds.

Let us apply these settled principles to the present case:

Obviously E. G. & E. Wallace did not employ F. H. Prince & Company, or M. F. Dickinson, Jr., F. H. Prince & Company's attorney, to examine the Ordinances 314 and 315 to ascertain any facts with regard to these refunding bonds. That was not within the scope of the employment of F. H. Prince & Company by E. G. & E. Wallace. F. H. Prince & Company were bankers and brokers whom E. G. & E. Wallace had employed only to sell the Page Belting Company's stock. That was the scope and extent of their authority and of their duty. It was no part of their duty, as such agents, to examine into the validity of the Santa Cruz bonds, or any other bonds. Coffin & Stanton were trying to sell these Santa Cruz refunding bonds, and employed F. H. Prince & Company as their agents for this purpose. As such agents F. H. Prince & Company offered these bonds to E. G. & E. Wallace, accompanied by an opinion of the city attorney of the city of Santa Cruz approving the validity of the bonds, also an opinion of one Gleason, an attorney for Coffin & Stanton, approving the validity of these bonds. E. G. & E. Wallace then, acting for themselves and not through F. H. Prince & Company, or through any other agents, said to F. H. Prince & Company, who, with Coffin & Stanton, their principals, were on the vendor's side of the transaction: "No; we are not satisfied with the opinion of the city

attorney, or with the opinion of Gleason. We do not know them. You furnish an opinion of an attorney in Boston and we will consider the matter." Thereupon F. H. Prince & Company suggested getting the opinion of M. F. Dickinson, Jr., and E. G. & E. Wallace said his opinion would be satisfactory. F. H. Prince & Company, for themselves *and on their own account, and not as agents* of E. G. & E. Wallace, obtained the opinion of M. F. Dickinson, Jr. So found by the Court (Record, pp. 40, 41). These ordinances 314 and 315 were among the legal papers in the possession of the vendors, Coffin & Stanton, submitted by them to their agents, F. H. Prince & Company, and by F. H. Prince & Company to M. F. Dickinson, Jr., their attorney, all the time in the custody of the vendors and of their agents and of their attorneys. They never came into the possession or to the knowledge of E. G. & E. Wallace, the purchaser of these bonds, nor did they ever come into the possession or to the knowledge of any agent of E. G. & E. Wallace, the purchaser of these bonds, for E. G. & E. Wallace never had any agent in such purchase.

There was, therefore, no agency as respects E. G. & E. Wallace by virtue of which any constructive notice of these ordinances 314 and 315 could be imputed to E. G. & E. Wallace.

M. F. Dickinson, Jr., was not the attorney or agent of E. G. & E. Wallace, but was solely the attorney and agent of F. H. Prince & Company.

Not only is the fact found by the Court (Record, pp. 40, 41) that F. H. Prince & Company, on their own account and for themselves, and not acting as agents of E. G. & E. Wallace, employed said Dickinson to

give his opinion in relation to the validity of the bonds, and that said Dickinson, in the examination of said ordinances, and in giving said opinion, was not the agent or attorney of E. G. & E. Wallace, but acted solely as attorney of F. H. Prince & Company; but it is also true, as a matter of law, that, under such circumstances, the said M. F. Dickinson, Jr., was solely the attorney of F. H. Prince & Company, and did not sustain any contract relation whatever, or any relation of privity with E. G. & E. Wallace. The fact that F. H. Prince & Company employed M. F. Dickinson, Jr., to examine into the validity of the bonds and give his opinion, after they had had a conference with E. G. & E. Wallace as to whether his opinion would be satisfactory, does not change the relations of the parties.

A case precisely in point is *Savings Bank vs. Ward*, 100 U. S., 195. In that case the defendant Ward had been employed by some brokers to examine into the validity of the title to real estate. The Savings Bank agreed to make a loan upon the property. Further facts are stated in the opinion of the Court as follows (p. 197):

"Preliminaries being arranged, the brokers applied to the plaintiffs for the loan and obtained the same, giving the note and deed of trust with the certificate as security for the payment. *Before accepting the papers, the plaintiffs*, through their agent, required the brokers to sign the name of the borrower to the formal application for the loan, as exhibited in the transcript, and *that the certificate as to the title should be continued to the date of the transaction.*

Throughout, the negotiation for the loan was conducted entirely by the brokers with the plaintiffs, and it was the borrower who procured the second certificate from the defendant, the evidence showing that the defendant never came in contact either with the plaintiffs or the brokers."

It was afterwards found that the attorney, in examining the title, had overlooked a conveyance properly recorded. The Savings Bank brought an action at law against the attorney, alleging that they retained and employed him to examine the title, etc., and that he reported the title good, etc. This court held, however, that the attorney was *not* the attorney of the Savings Bank, and that there was no contract relation between them, and that the attorney was not liable in any way to the Savings Bank. The court made this holding (p. 197), notwithstanding the fact that

"Before accepting the papers, the plaintiffs [Savings Bank], through their agent, required * * * * * * * * * * * * * that the certificate as to the title should be continued to the date of the transaction."

See, also, to the same effect, *Dundee Mortgage Trust Investment Company vs. Hughes*, 10 Sawyer, 144, and cases there cited.

But even if F. H. Prince & Co. were to be deemed the agents of E. G. and E. Wallace in the matter of these bonds, and even if M. F. Dickinson, Jr., attorney for F. H. Prince & Co., were to be deemed connected with E. G. and E. Wallace, and even it were to be assumed that M. F. Dickinson, Jr., read ordinances Nos. 314 and 315, still there was no "bad faith" on the part of E. G. and E. Wallace, nor any negligence on their part, much less any "gross negligence" on their part, in not investigating in regard to the $89,000 of the water company bonds, which those ordinances expressly stated had "become part of the bonded indebtedness of the City of Santa

Cruz," in order to find facts in pais to contradict this express and positive statement by the City Council, the duly constituted representatives of the city.

We have shown in this brief (Point III., p. 125) that the $89,000 bonds of the water company, which the ordinances, Nos. 314 and 315, recite, "have become part of the bonded indebtedness of the city of Santa Cruz," might have become part of the bonded indebtedness of the city of Santa Cruz. It was not incumbent upon any one who proposed to purchase these refunding bonds, if he had read the said ordinances 314 and 315, and seen the statements therein contained, to go outside of the said ordinances and make an original investigation of matters *in pais*, or to investigate the proceedings of the city of Santa Cruz, to see whether or not, as a matter of fact, proper proceedings had been taken, etc., etc., to make the said $89,000 of bonds part of the bonded indebtednes of the city of Santa Cruz. Such proposed purchaser would not have been guilty of any bad faith, or of any gross negligence, or of any negligence whatever, if he had accepted the statement of the city council, to the effect that such bonds had become part of the bonded indebtedness of the city of Santa Cruz, and had failed to make a separate and independent investigation, in order to learn the truth or falsity of this statement of the city council, the duly constituted representative of the city.

Therefore, any holder of these refunding bonds would not be affected with constructive notice of any facts which he might have learned if he had made such independent inquiry and investigation.

A case in point is that of *Ware vs. Lord Egmont*, 4 DeG., M. & G., 460 (1854). In that case (p. 464):

"It was in evidence that the abstract of title furnished to Lord *Arden* showed on the face of it that *Nathaniel Polhill* had died an infant and unmarried in *April*, 1802. It further appeared that, upon the abstract of title delivered to Lord *Arden's* solicitors, the property sold was described to be property, the land tax of which had been redeemed. It was admitted that neither Lord *Arden* nor his advisers had any actual notice of the Plaintiff's claim, nor of the decree in *Ware vs. Polhill* (11 Ves., 257), nor of the fact of any payment of the rent-charge having ever been made by *Frederick Polhill*."

The Lord Chancellor (CRANWORTH), giving the opinion of the Court, said (p. 470):

"In this state of things, *Frederic* in 1835 sold the *Surrey* property for 19,000*l.* to Lord *Arden*. It was sold and conveyed as property the land tax of which was redeemed; and it is admitted neither Lord *Arden* nor his advisers had any actual notice of the claim of the infant's personal representatives, that they had no actual notice either of the decree or of the fact of payment of the rent charge. But the question is, whether, though there was no actual notice, there was not what is called constructive notice, notice of that which ought to have led Lord *Arden's* advisers to make further inquiries, under which the whole truth would have come out, and the omitting to make which amounted to culpable negligence. For if such constructive notice is established, no doubt the Defendants claiming under Lord *Arden* are bound by all the equities which affected *Frederic Polhill* the vendor, and he was certainly in no better position than that in which his brother *Thomas* had stood at the time of Lord *Eldon's* decree in 1805."

The Golden Rule as to Constructive Notice.

The Lord Chancellor then, after considering the facts of that particular case, and finding that there had not been any negligence on the part of Lord *Arden*, or of his solicitor, in not making further investigation of the facts of which they had notice on the abstract of title, lays down principles so just, so necessary and so important that we emphasize them. He says (p. 473):

"I must not part with this case without expressing my entire concurrence in what has on many occasions of late years fallen from Judges of great eminence on the subject of constructive notice, namely, that it is highly inexpedient for Courts of Equity to extend the doctrine—to attempt to apply it to cases to which it has not hitherto been held applicable. Where a person has actual notice of any matter of fact, there can be no danger of doing injustice if he is held to be bound by all the consequences of that which he knows to exist. But where he has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as enable the Court to say, not only that he might have acquired, but also, that he ought to have acquired, the notice with which it is sought to affect him—that he would have acquired it but for his gross negligence in the conduct of the business in question.

The question, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might by prudent caution have obtained, the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence."

The foregoing language of Lord CRANWORTH is quoted with approval by this court in *Wilson vs. Wall*, 6 Wall., 83, 91. See also the decisions of this court applicable to *negotiable instruments* quoted on this Brief (p. 92), in which this court holds that in order that any purchaser of negotiable instruments may be affected with notice of any defect in such instruments, not even negligence on his part is sufficient, but that he must be guilty of "*bad faith*." E. G. & E. Wallace were not guilty of either negligence or bad faith. It is found by the court that they paid full value and had no *actual* notice. To hold that they had *constructive* notice of any fact by reason of any agency of F. H. Prince & Co., as urged by counsel for the city of Santa Cruz would be to apply the doctrine of constructive notice to the working of the grossest injustice, and would be contrary to the well-settled principles and authorities above set forth.

For the foregoing reasons the judgment of the Circuit Court of Appeals in this case should be reversed, and the judgment

of the Circuit Court should be affirmed, with a modification which should permit the recovery of the plaintiff on the three coupons of the Northern Counties Investment Trust Company, Limited, mentioned in Finding of Fact No. 3 (Record, p. 18 and this brief, p. 141), as well as upon all the other bonds and coupons sued on.

JOHN F. DILLON,
HARRY HUBBARD,
JOHN M. DILLON,
Counsel for Petitioner.

APPENDIX.

Constitution of California, Article XI., § 18, as to City Incurring Indebtedness.

"SEC. 18. No county, city, town, township, Board of Education, or school district shall incur any indebtedness or liability in any manner, or for any purpose, exceeding in any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof on or before maturity, which shall not exceed forty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void." [Amendment adopted November 8, 1892, consisted in making this read "*forty*" years, as here quoted, instead of "*twenty*" years, as theretofore.]

The Enabling Act of March 1, 1893, under which the bonds in suit were issued is reprinted ante pp. 3–5.

Municipal Improvement Bond Act of 1887.

"An Act authorizing the incurring of indebtedness by cities, towns, or municipal corporations, incorporated under the laws of this State.

"[Approved March 15, 1887.]

"*The People of the State of California, represented in Senate and Assembly, do enact as follows:*

"SECTION 1. Any city, town, or municipal corporation, incorporated under the laws of this State, may, as hereinafter provided, incur indebtedness to pay the cost of any permanent municipal improvement requiring an expenditure greater than the amount allowed for such improvements by the ordinary annual tax levy.

"SEC. 2. Whenever the legislative branch of any city, town, or municipal corporation shall, by ordinance passed by a vote of three fourths of all its members and approved by the Executive of said city, town, or municipal corporation, determine therein that the public interest or necessity demands the acquisition, construction, or completion of any permanent municipal building, work, sewer, property, water rights, bridges, or improvement, the cost of which is too great to be paid for out of the ordinary annual income and revenue of the municipality, they may, after publication of such ordinance for at least two weeks in some newspaper published in such city, town, or municipal corporation, and at the next regular meeting after such publication, or at an adjourned meeting thereat, by ordinance, passed by a vote of three fourths of all its members, and also approved by the said Executive, call a special election, and submit to the qualified voters of said city, town, or municipal corporation the proposition of incurring a debt for the purpose set forth in the ordinance, and no question other than the incurring of indebtedness for said purpose shall be submitted. The ordinance of the city calling such special election shall recite the objects and purposes for which the indebtedness is proposed to be incurred; the estimated cost of such improvement; the necessity for such improvement; and that bonds of the city for municipal improvement

shall issue for the payment of the cost, as in said ordinance set forth, if the proposition be accepted by the qualified voters of the city, as hereinafter provided, and shall fix the day on which such special election shall be held, the manner of holding such election, and of voting for or against incurring the indebtedness; *provided*, such election shall be held as provided by law for holding elections in such city, town, or municipal corporation.

"SEC. 3. Said ordinance shall be published, once each day, for at least ten days, or once a week for two weeks, before the publication of the notice of the special election, in some newspaper published in such city, town, or municipal corporation. After said publication said legislative body shall cause to be published, for not less than two weeks, in at least one each of the newspapers of such city, a notice of such special election, the purposes for which the indebtedness is to be incurred, the amount of indebtedness to be incurred, the number and character of the bonds to be issued, the rate of interest to be paid, and the amount of tax levy to be made for the payment thereof. It shall require a vote of two thirds of all voters, voting at such special election, to authorize the issuance of the bonds herein provided.

"SEC. 4. All bonds of municipality, for permanent improvements, issued under the provisions of this Act, shall be of a character of bonds known as serials, and shall be payable in the manner following: One twentieth part of the whole amount of indebtedness shall be payable each and every year, on a day to be fixed by the legislative branch of the city, together with the annual interest on all sums unpaid at such date; and the bonds shall be issued in such amount as the government of such city may determine, but not less than one hundred dollars each or more than one thousand dollars each, payable on the day fixed in said bond, with interest not to exceed the sum of five per cent. per annum. Such bonds may be sold by the said legislative branch of such city, town, or municipal corporation as they may determine, at not less than their face value in gold coin of the United States; and the proceeds of such sale shall be placed in the treasury of such city, town, or municipal corporation, to the credit of the "Municipal Improvement Fund", "No.——," or other designation, and shall be applied exclusively to the purposes and

objects mentioned in the ordinance providing for the issuance of such bonds, until said objects are accomplished; and the residue, if any, shall be transferred to the General Fund of said city, town, or municipal corporation.

SEC. 5. The legislative branch of such city shall, at the time of fixing the general tax levy of said city, and in the manner for such general tax levy provided, levy and collect annually each year for the term of twenty years, a tax sufficient to pay the annual interest on said bonds, and also one twentieth part of the aggregate amount of such indebtedness so incurred. The taxes herein required to be levied and collected shall be in addition to all other taxes levied for city purposes, and shall be collected at the same time and in the same manner as other city taxes are collected.

SEC. 6. Within thirty days after the sale of such bonds, the Executive of said city, town, or municipal corporation shall appoint a Commissioner of such improvement, who shall be confirmed by a vote of not less than three fourths of the members of the legislative branch of said municipal government, and the Commissioner shall have charge of the said improvement and the disbursement of the said funds for such purposes, subject to the conditions of the ordinances of the said city providing for such work or improvement, and such ordinances as may at any time be passed relating thereto; but the Commissioner, when appointed, shall not be removed until the completion of the said improvement, unless by order of the Executive, concurred in by a vote of three fourths of said legislative branch.

SEC. 7. The compensation of the Commissioner to be appointed under the provisions of this Act shall be fixed by ordinance not to exceed five dollars per day for each day of actual service; said Commissioner shall execute an official bond, in the penal sum of ten thousand dollars ($10,000), for the faithful performance of his duties.

SEC. 8. All contracts for the construction or completion of any work, or of improvements, or furnishing of materials for work or improvements, as herein provided for, shall be let to the lowest responsible bidder, who shall furnish such bonds as the legislative branch of said city, town, or municipal corporation may require.

SEC. 9. Whenever the legislative branch of such city, town, or municipal corporation shall, by resolution, deem it necessary, the Treasurer of such city shall, within ten days after the passage of such resolution, give additional bonds, provided for the proper care and custody of any municipal improvement fund, as in this Act provided.

SEC. 10. All general and special Acts and parts of such Acts in conflict with this Act, or abridging the rights of cities, towns, or municipal corporations herein, are hereby repealed.

SEC. 11. This Act shall take effect and be in force from and after its passage."

Session Laws of California, 1887, p. 120.

Municipal Improvement Bond Act of 1889, as Amended.

"An Act authorizing the incurring of indebtedness by cities, towns and municipal corporations, incorporated under the laws of this State, for the construction of waterworks, sewers and all necessary public improvements, or for any purpose whatever, and to repeal the Act approved March 9th, 1885, entitled 'An Act to authorize municipal corporations of the fifth class, containing more than three thousand and less than ten thousand inhabitants, to obtain waterworks;' also, to repeal an Act approved March 15th, 1887, entitled 'An Act authorizing the incurring of indebtedness by cities, towns and municipal corporations incorporated under the laws of this State.' [Approved March 19th, 1889, Stat. 1889, p. 399.]

The People of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. Any city, town or municipal corporation incorporated under the laws of this State may, as hereinafter provided, incur indebtedness to pay the

cost of any municipal improvement or for any purpose whatever requiring an expenditure greater than the amount allowed for such improvement by the annual tax levy.

SECTION 2. Whenever the legislative branch of any city, town or municipal corporation shall, by ordinance passed by a vote of two-thirds of all its members, and approved by the executive of said city, town or municipal corporation, determine that the public interests or necessity demands the acquisition, construction or completion of any municipal buildings, bridges, waterworks, water rights, sewers, or other municipal improvements, the cost of which will be too great to be paid out of the ordinary annual income and revenue of the municipality, they may, after the publication of such ordinance for at least two weeks in some newspaper published in such municipality, and at their next regular meeting after such publication, or at an adjourned meeting, by ordinance passed by a vote of two-thirds of all its members, and also approved by the said executive, call a special election and submit to the qualified voters of said City, Town, or municipal corporation, the proposition for the purpose set forth in the ordinance, and no question other than the incurring of indebtedness for said purpose shall be submitted. The ordinance calling such special election shall recite the objects and purposes for which the indebtedness is proposed to be incurred, the estimated cost of the proposed public improvement, the necessity for such improvement, and that the bonds of the municipality shall issue for the payment of the cost of such improvement, as in such ordinance set forth, if the proposition be accepted by the qualified voters, as hereinafter provided, and shall fix the day on which such special election shall be held, the manner of holding such election, and the voting for or against incurring such indebtedness ; such election shall be held as provided by law for holding such election in such city, town, or municipal corporation ; provided, however, that where by the terms or provisions of the charter of any city, town, or municipal corporation, the cost of making the proposed improvements is to be or must be paid from a special fund created by such charter for that purpose, the proposition of incurring such an indebtedness may be submitted to the qualified voters at any general election for officers of the State of Cali-

fornia, or of such city, town, or municipal corporation. (As Amended Stat. 1891, p. 84.)

SECTION 3. Such ordinance shall be published once a day, for at least ten days, or once a week for two weeks before the publication of the notice of the special election, in some newspaper published in such municipality. After said publication, said legislative body shall cause to be published for not less than two weeks, in at least one of the newspapers published in such municipality, a notice of such special election, the purpose for which the indebtedness is to be incurred, the number and character of the bonds to be issued, the rate of interest to be paid, and the amount of tax levy to be made for the payment thereof. It shall require the votes of two-thirds of all the voters voting at such special election to authorize the issuance of the bonds herein provided.

SECTION 4. It shall be the duty of the legislative branch of any municipality contemplating permanent public improvements, to first have plans and estimates of the cost of such improvements made by a competent engineer or architect, who has had successful experience in such work, before the question of incurring an indebtedness for such improvement is submitted to vote.

SECTION 5. No city, town, or municipal corporation shall incur an indebtedness for public improvements which shall, in the aggregate, exceed fifteen per cent of the assessed value of all the taxable real estate and personal property of such city, town, or municipal corporation. (As Amended Stat. 1891, p. 84.)

SECTION 6. All municipal bonds for public improvements issued under the provisions of this Act shall be of the character of bonds known as serials, and shall be payable in gold coin or lawful money of the United States, in the manner following: One-fortieth part of the whole amount of indebtedness shall be paid each and every year, on a day and at a place to be fixed by the legislative branch of the municipality issuing the bonds, together with the interest on all sums unpaid at such date. The bonds shall be issued in such denominations as the legislative branch of the municipality may determine, except that no bonds shall be of a less denomination than one hundred dollars, nor of a greater denomination than one thousand dollars each, payable on the day and at the place fixed in such bond, and with interest at the rate specified in the bond,

which rate shall not be in excess of the legal rate of the State of California, and may be payable annually or semi-annually. Such bonds may be issued and sold by the legislative branch of the city, town, or municipal corporation, as they may determine, at not less than their face value, in gold coin of the United States, and the proceeds of such sale shall be placed in the municipal treasury to the credit of the proper improvement fund, and shall be applied exclusively to the purposes and objects mentioned in the ordinance, until such objects are fully accomplished, after which if any surplus remains, such surplus shall be transferred to the General Fund of such municipality. (As Amended Stat. 1893 p. 61.)

SECTION 7. The legislative branch of any city, town, or municipal corporation, issuing bonds under authority of this Act, shall have the right to determine the rate of interest such bonds shall bear ; provided that in no case shall it exceed seven per cent. per annum, and to name the date and place where such bonds and interests shall be paid ; provided that the place of payment shall be either at the office of the Treasurer of the municipality, or at some designated bank in San Francisco, Chicago, New York or Boston. The said bonds shall be signed by the Executive of the Municipality, and also by the Treasurer thereof, and shall be countersigned by the Clerk. The coupons of said bonds shall be numbered consecutively and signed by the Treasurer.

SECTION 8. The legislative branch of said city, town, or municipal corporation shall, at the time of fixing the general tax levy, and in the manner for such general tax levy provided, levy and collect annually, each year, for the term of forty years, a tax sufficient to pay the annual interest on such bonds, and also one-fortieth part of the aggregate amount of such indebtedness so incurred. The taxes herein required to be levied and collected shall be in addition to all other taxes levied for municipal purposes and shall be collected at the same time and in the same manner as other municipal taxes are collected. (As amended Stat 1893 p. 61.)

SECTION 9. It shall be the duty of the legislative branch of every city, town, or municipal corporation, wherein public improvements are being made under the provision of this Act, to make all needful rules and regulations for carrying out and maintaining such improve-

ments; to appoint all needful agents, superintendents, and engineers to properly look after the construction and operation of such public works, and in all lawful ways to protect and preserve the rights and interests of the municipality; provided, however, that in cities, towns, or municipalities operating under a charter heretofore or hereafter framed under Section eight of Article eleven of the Constitution, and having a Board of Public Works, all the matters and things required in this section to be done and performed by the legislative branch of the municipality shall be done and performed by the Board of Public Works of such city, town, or municipality. (As Amended Stat. 1891 p. 132.)

SECTION 10. All contracts for the construction or completion of any public works or improvements, or for furnishing labor or materials therefor, as herein provided, shall be let to the lowest responsible bidder. The legislative branch of the municipality shall advertise, for at least ten days, in one or more newspapers published in the municipality, inviting sealed proposals for furnishing the labor and materials for the proposed improvements, before any contract shall be made therefor. The said legislative branch shall have the right to require such bonds as they may deem best from the successful bidder, to insure the faithful performance of the contract work. They shall also have the right to reject any or all bids; provided, however, that in cities, towns or municipalities operating under a charter heretofore or hereafter framed under Section Eight of Article Eleven of the Constitution, and having a Board of Public Works, all the matters and things required in this section to be done and performed by the legislative branch of the municipality shall be done and performed by the Board of Public Works of such city, town, or mucipality. (As Amended Stat. 1891. p. 132.)

SECTION 11. Whenever the legislative branch of any municipality shall by resolution deem it necessary they may require the Treasurer of such municipality to give additional bonds for the safe custody and care of the public funds.

SECTION 12. The Act approved March 9th, eighteen hundred and eighty-five, entitled "An Act to authorize municipal corporations of the fifth class, containing more than three thousand and less than ten thousand inhabitants, to obtain public water works," and

the Act approved March 15th, eighteen hundred and eighty-seven, entitled "An Act Authorizing the Incurring of Indebtedness by Cities, Towns and Municipal Corporations, Incorporated Under the Laws of this State," and all general Acts, or special Acts, or parts of Acts, conflicting with this Act, are hereby repealed.

SECTION 13. This Act shall take effect and be in force from and after its passage."

Session Laws of California, 1889, p. 399.
Session Laws of California, 1891, pp. 84, 132.
Session Laws of California, 1893, p. 61.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

No. 598.

ALBERT H. WAITE, PETITIONER,

vs.

THE CITY OF SANTA CRUZ, RESPONDENT.

Brief of Respondent in Opposition to Petition for Writ of Certiorari.

ARGUMENT.

Part I.

ANSWER TO PETITION.

Ground Stated in Petition Insufficient to Justify Issuance of Writ.

This is a petition for a writ of *certiorari* to the United States circuit court of appeals for the ninth circuit to bring up for review the decision rendered by that court in the

case of "City of Santa Cruz *vs.* Albert H. Waite" (a case arising under and upon the statutes of California), upon the ground, and solely upon the ground, that said court erred in construing and applying certain decisions of the Supreme Court rendered in other and prior cases arising upon the statutes of States other than California.

The language of the petition, stating the ground thereof, is as follows:

"Your petitioner states that the said judgment of the "United States circuit court of appeals is contrary to law "and directly contrary to the decisions of this Supreme "Court, especially in the case of Hackett *vs.* Ottawa, 99 U. S., "86, and the case of Evansville *vs.* Dennett, 161 U. S., 434" (Petition, pages 2 and 3).

No other ground of application for the writ is stated in the petition. This, we submit, is an insufficient showing, even if it were well founded, to justify the issuance of a writ of *certiorari* in a case arising, as this case admittedly does, under section 6 of the act of March 3, 1891, creating the circuit courts of appeals.

The statute expressly denies to the defeated party the right to carry his case to this Supreme Court either by appeal or by writ of error, and limits his right to be heard in this court to cases certified here by circuit courts of appeals and such "extraordinary cases" as to this court may seem to justify interposition by the writ of *certiorari*. Certainly the mere allegation that the circuit court of appeals has erred in the construction and application of authorities does not in a matter affecting only the private interests of the litigants create such an "extraordinary case" as would justify interposition by *certiorari* in a matter in which Congress has expressly denied the right of appeal and of proceeding by writ of error to correct or review such errors as are here alleged.

In the case of American Construction Company *vs.* Jack-

sonville Railway, 148 U. S., 382, this court, discussing the meaning, object, and policy of the act, said:

"The primary object of this act, well known as a matter "of public history, manifest on the face of the act, and judi- "cially declared in the leading cases under it, was to relieve "this court of the overburden of cases and controversies, "arising from the rapid growth of the country, and the "steady increase of litigation, and for the accomplishment "of this object, to transfer a large part of its appellate "jurisdiction to the circuit courts of appeals thereby estab- "lished in each judicial circuit, and to distribute between "this court and those, according to the scheme of the act, "the entire appellate jurisdiction from the circuit and dis- "trict courts of the United States (McLish *vs.* Roff, 141 "U. S., 661, 666; Lau Ow Bew's case, 141 U. S., 583, and "144 U. S., 47).

"The act has uniformly been so construed and applied by "this court as to promote its general purpose of lessening "the burden of litigation in this court, transferring the ap- "pellate jurisdiction in large classes of cases to the circuit "court of appeals and making the judgments of that court "final, except in extraordinary cases."

This rule has been reiterated with equal positiveness in later cases, notably Forsyth *vs.* Hammond (166 U. S., 514, 515), in which the court said:

"While this power is coextensive with all possible neces- "sities and sufficient to secure to this court a final control "over the litigation in all the courts of appeal, it is a power "which will be sparingly exercised, and only when the cir- "cumstances of the case satisfy us that the importance of "the question involved, the necessity of avoiding conflict "between two or more courts of appeal or between courts of "appeal and the courts of a State or some matter affecting "the interests of the nation, in its internal or external rela- "tions, demands such exercise."

While petitioner in this case has chosen to denominate his proceeding as a "petition * * * for writ of certiorari," it is, in substance and effect, and even upon its face manifestly appears to be, a petition for a writ of error to reverse the final decision of a circuit court of appeals in an ordinary action at law, in which the diverse citizenship of the parties is the only basis of Federal jurisdiction.

To grant a writ of certiorari for the correction of such error as is alleged in this case would, we submit, tend to unsettle the views of the entire bar of the country with respect to the finality of all decisions of the circuit courts of appeals in cases coming within the terms of section 6 of the act of 1891, and would encourage, if not compel, applications for writs of certiorari in all such cases in which error might be fairly asserted on appeal or on writ of error. If the writ of *certiorari* should be granted in this ordinary case because of the errors alleged, why not in every case in which the defeated litigant can make a plausible showing of error in the opinion filed by the court of appeals?

2. Question involved not general, but local in character and effect.

Petitioner (Petition, p. 3) states that the decision complained of in this case "relates, not to a mere question of local law or importance, but to a question of commercial law affecting vast interests in every State of the Union."

The rule of commercial law referred to by petitioner is not, in any sense, questioned in this case. It has never been questioned by counsel for respondent, and it is as strongly stated in the prevailing opinion of the circuit court of appeals (Record, pp. 577 *et seq.*; 98 Fed. Rep., 391) as in any of the authorities which petitioner cites.

The question involved is the effect of the local laws of the State of California to exclude the bonds in question from the operation of that acknowledged rule of commercial law. The

competency of every State to limit and determine the scope and effect of recitals in municipal bonds issued under its laws has been uniformly upheld by this supreme court.

"It was entirely competent for a State to provide by "statute that all obligations, in whatever form executed by a "municipality existing under its laws, shall be subject to "any defense that would be allowed in cases of non-nego-"tiable instruments."

Gunnison County *vs.* Rollins, 173 U. S., 276.

The circuit court of appeals in this case, without in any manner questioning, but expressly conceding and asserting, the rule laid down in Hackett *vs.* Ottawa, Evansville *vs.* Dennett, Chaffee County *vs.* Potter, and Gunnison County *vs.* Rollins holds that certain provisions of the statutes of California, properly and competently enacted by the legislature of that State, so far limit the effect of recitals, in the particular bonds in question, as to enable the city of Santa Cruz to plead and prove the invalidity of the bonds as a defense to an action brought upon the bonds by an innocent holder for value.

On this point we respectfully invite a careful examination of the prevailing opinion of the circuit court of appeals (Record, pp. 577 *et seq.*; 98 Fed. Rep., 388 *et seq.*).

3. This is not in any sense an "extraordinary case," and does not present any other element justifying interference with the finality of the circuit court of appeals' decision.

The act (March 3, 1891) establishing the circuit courts of appeals "has uniformly been so construed and applied by this court" as to make "the judgments of that court final except in extraordinary cases" (Amor. Const. Co. *vs.* Jacksonville Railway, 148 U. S., 382), and the power,

by *certiorari*, to exercise "a final control over the liti-"gation in all the courts of appeal is a power "which will be sparingly exercised, and only when the cir-"cumstances of the case satisfy us that the importance of the "question involved, the necessity of avoiding conflict be-"tween two or more courts of appeal, or between courts of "appeal and courts of a State, or some matter affecting the "interests of this nation, in its internal or external relations, "demands such exercise" (Forsythe *vs.* Hammond, 166 U. S., 514, 515).

Counsel for petitioner admits that this is not an extraordinary case, saying: "In all these respects this case pre-"sents only the usual and ordinary case of negotiable mu-"nicipal bonds, and *there is absolutely nothing peculiar in this* "*case* except the decision and judgment of the circuit court "of appeals" (Brief, p. 5).

This declaration of counsel is true in all but its concluding phrase, which we hesitate to believe was intended as a slur upon one of the greatest and ablest courts of appeals of this nation.

Yet in that statement counsel have completely answered their petition for a writ of *certiorari*, and have stated themselves out of court.

We submit that a writ of *certiorari* to the circuit court of appeals should not be granted in a case arising under section 6 of the act of March 3, 1891, which does not involve any conflict between two or more courts of appeal nor between courts of appeal and the courts of a State, nor any matter affecting the interests of the nation at large, and which, it is admitted, presents only "usual and ordinary" questions, concerning which the law is well settled, and about which "there is absolutely nothing peculiar."

4. Other Questions Involved.

In the circuit court of appeals the judgment of the circuit court in this case was attacked by respondent herein on seventeen distinct grounds, only two of which were passed upon by the court of appeals.

Concerning its omission to pass upon the other questions involved in the case on appeal, that court in its opinion, after discussing the one question presented by petitioner here, said:

"Entertaining these views, it is not necessary to decide "any other point made and argued by counsel, except that "as to the jurisdiction of the court. We have no doubt of "the existence of jurisdiction" (Record, p. 589; 98 Fed. Rep., 393).

Of the fifteen points made by respondent against the judgment of the circuit court, which were left undecided by the circuit court of appeals, several are as important as the one decided in our favor, and, if decided in favor of this respondent, would involve and require the same judgment to be entered by the circuit court of appeals which is here complained of.

It seems to us that this fact, shown by the assignment of errors in the record and by the prevailing opinion of the circuit court of appeals, makes it incumbent upon the petitioner, if the writ of *certiorari* may properly issue in such a case as this, to show to this court that, as against all of said assigned errors, the judgment of the circuit court should have been affirmed—in other words, that the *decision* of the circuit court of appeals, *and not merely the reason given for its decision*, is erroneous.

5. No Moral Ground for Interposition.

As every application for a writ of *certiorari* in cases of this kind is addressed to the sound discretion of the court, moral as well as legal considerations appearing upon the face of the record may and should be considered by the court in granting or refusing the writ.

If a city having received full consideration for its bonds attempts, upon technical and doubtful grounds, to repudiate them, courts should undoubtedly encourage all lawful and honorable steps taken by the *bona fide* holders of such bonds to enforce their payment; but where, as in this case, a city has deen despoiled of its bonds, intended for sale, by an act rising to the evil eminence of larceny, receiving no consideration whatever therefor, and such bonds find their way into the hands of purchasers, not for "full value paid," as stated by petitioner (Petition, p. 3), but for various prices and by various methods (some by direct purchase, others by hypothecation as collateral security, etc.), and such bonds are held to be invalid and void in the hands of such purchasers (even assuming them to be innocent) by the highest appellate court to which citizens may of right carry such cases under the laws of the land; this court should not interpose a purely discretionary power to disturb such judgment, but should leave them to the remedies provided by law in its ordinary course.

The city of Santa Cruz did not receive any consideration whatever for the bonds in question (finding of fact No. 15, Rec., p. 46; testimony of Chas. E. Williams, treasurer, Rec., p. 409), and occupies as fair a position morally as do those who claim to be innocent purchasers for value.

Part II.

ANSWER TO PETITIONER'S BRIEF.

This case is clearly distinguishable from the cases of Hackett vs. Ottawa, Evansville vs. Dennett, and Gunnison County Commissioners vs. E. H. Rollins & Sons.

While we respectfully contend that this case is not of such extraordinary character as to call for review by this Court of the decision of the circuit court of appeals, but rather belongs to that great class of cases in which applications have been made for writs of certiorari on the ground of alleged error in the decisions of circuit courts of appeals, and which applications have been uniformly denied, and while it seems to us that the very purpose of the act creating circuit courts of appeals is partially defeated when the Supreme Court is required, on applications for writs of certiorari in ordinary actions at law, to consider extensive briefs and records, and in reality review such cases before determining whether such applications shall be granted or denied, yet, as counsel for petitioner insist with great earnestness that the circuit court of appeals in this case has committed error by failing to follow the decisions of this court in certain cases in which it is claimed the same question is involved, we will venture to briefly answer their argument.

The enabling act under which the bonds in question were issued required notice of election to be given by the mayor and common council (Stats. of California 1893, p. 59; Petitioner's Brief, p. 3). This notice was made jurisdictional by said act, which provided that such notice should recite the indebtedness to be refunded, together with all details of the proposed issue. This power could be exercised in one mode

only, to wit, by proceedings duly held at a meeting of the mayor and common council duly assembled as a board and spread upon the public records as a permanent record of a public character and open to the inspection of all. This results from the provisions of the enabling act of 1893, construed and read as it must be in connection with the charter of the city of Santa Cruz (Stats. of California 1875–1876, pp. 189–207).

There is no other conceivable way in which the notice of election specified in the statute could be given. The mayor and the council must give it and provide for it, and they must do it officially and in the manner provided by the charter, to wit, by ordinance, for in no other way could they act or proceed.

Jersey City *vs.* Central, etc., 40 N. J. Eq., 419.
People *vs.* Bailache, 52 Cal., 310.
Dey *vs.* Mayor, 19 N. J. Eq. P., 416.
Schumm *vs.* Mayor, 24 N. J. Eq. P., 153.
15 Am. & Eng. Encyp., pp. 1028, 1029.
Stevenson *vs.* Bay City, 26 Mich., 46.
Talcott *vs.* Noell, 78 N. W., 39, 40.
Lehman *vs.* San Diego, 83 Fed., 670.
Wasson *vs.* Saline, 73 Fed., 919.

The ordinances of the mayor and common council were public records, required to be kept "separately, in large, "well-bound, uniform, and suitable books" (Stats. California 1875–1876, sec. 40, p. 203); such an ordinance was so adopted, recorded, and kept as a public record (findings, Rec., pp. 34, 35, 36, 37, 63 to 75; opinion of circuit court, Rec., p. 100, sub. 4).

This brings the case at bar directly within the rule laid down in Lehman *vs.* San Diego, 83 Fed., 670; Dixon *vs.* Field, 111 U. S., 93, and Sutliff *vs.* Board, 147 U. S., 230, and takes it out of the category of Hackett *vs.* Ottawa, and other cases relied upon by petitioner.

Suppose the statutes of 1893 had been worded thus:

"The governing body of any city or town having an out-
"standing indebtedness, evidenced by bonds and warrants
"thereof, shall have power to pass an ordinance and enter
"the same in its ordinance record, which shall consist of
"large, well-bound, uniform and suitable books, kept at all
"times open for public inspection, calling, and prescrib-
"ing the form of notice of, an election to determine the
"question of refunding such indebtedness. Such notice
"shall recite and describe the particular bonds or war-
"rants to be refunded, together with the denomi-
"nation, character, time of payment, rate of interest,
"as well as all other details of the bonds proposed to be
"issued; and such recital and description shall fix the de-
"nominations of the refunding bonds at not less than $100
"and not more than $1,000, and the principal and interest
"as payable in coin or currency at the office of the treas-
"urer or some designated bank, such interest not exceeding
"6 per cent. per annum. If the requisite vote be in favor
"of refunding the indebtedness recited in said ordinance
"and notice, the bonds specified and described in said
"notice and ordinance shall be sold by said governing body
"to the highest bidder for not less than their face value."

If such had been the statute, the question before the court would be exactly the same.

Now, reading the statute with the charter, we have the statute supposed.

In other words, the legislative authority under which these bonds were issued is just what it would have been under the statute supposed, and we have a case legally identical with Lehman *vs.* San Diego. The acutest and most subtle metaphysics cannot draw a distinction between a statute authorizing the officials of a town to issue or sell *the bonds* specified, recited, or described in an ordinance already passed and recorded and a statute giving them power to issue or sell *the bonds* described, recited, or specified

in an ordinance thereafter to be passed and recorded and thereby authorized.

The unsubstantial and only distinction between Waite *vs.* Santa Cruz and Lehman *vs.* San Diego is that in the latter the governing body of the municipality, without previous authority, enacted an ordinance providing for the issuance of certain specified, described, and recited bonds in a specified mode and upon certain declared conditions, and the legislature afterward ratified, confirmed, and made valid the ordinance, while in the former the legislature, in advance, enacted that the governing body should have power to enact a similar ordinance, and, on its ratification by the electors, might issue those specified, described, and recited bonds in the mode and upon the conditions set forth, recorded, and made certain in and by the terms of the ordinance, provided, however, that the ordinance should show on its face that the bonds to be issued were refunding bonds issued to take up previous indebtedness evidenced by bonds or warrants *of the city*.

It is obviously immaterial whether the legislature ratifies the ordinance, as in Lehman *vs.* San Diego, or authorizes it in advance, as in this case. The ratification is the equivalent, and cannot be more than the equivalent, of previous authorization. The substantial points of resemblance, or, rather, of absolute legal identity, between the two cases cover the whole ground of debate. In neither was there given or conferred by the legislature any *general* power to issue bonds, coupled with conditions on the exercise of the power, the right to determine the existence of which conditions rested *in pais* or in parol and was committed to the decision of the governing body either expressly or by any implication.

It was frankly and properly conceded at the oral argument of this case before the circuit court of appeals that Lehman *vs.* San Diego was properly decided and was but a corollary of Dixon *vs.* Field. But why is this necessarily

so? Because the principle established in Dixon *vs.* Field, 111 U. S., 83, and Sutliff *vs.* Board, 147 U. S., 230, and kindred cases, is that if the statute *expressly* requires the facts constituting the condition precedent to the authority to issue the bonds to be made a matter of public record, open to the inspection of every one, *there can be no implication* that it was intended to leave that matter to be determined and concluded, contrary to the facts so recorded, by the officers charged with the duty of issuing the bonds.

In Lehman *vs.* San Diego the statute did expressly require the facts to be made a public record simply because under the statute the facts were required to be contained in the proceedings of the board. The ordinance ratified gave the board authority to issue the bonds when and to whom such board *might by resolution direct*. The court said: "Under "the terms of the ordinance, no bond could be issued or de- "livered except upon a resolution of the board, *appearing* "*upon its minutes or the record of its proceedings*, thus furnish- "ing a most important safeguard against fraud and an "abuse of power. Every person dealing in the bonds is "bound, at his peril, to inquire whether they were issued in "the mode prescribed."

Lehman *vs.* San Diego, 83 Fed., 673.

That is, under the statutes and laws of California and by intendment and construction of law, a statutory requirement that a certain fact shall be embodied in a resolution or ordinance is an express requirement that it be made a matter of public record, open to the inspection of every one.

So, in Wesson *vs.* Saline, 73 Fed., 919, it is said: "Com- "mon councils, boards of commissioners, and like municipal "bodies can act only by order, ordinance, or resolution, as "every one is bound to know."

Consequently when a statute, as in the Lehman case, refers to an ordinance or resolution it means *ex vi termini*, something appearing on a public record, and by a perfect

parallelism the statute in this case (of 1893), by its reference to the notice of election, enacts and provides for a public record. The notice of election could be framed and devised only by the mayor and common council, and their acts must appear of record. This must be so on general principles, for in no other way can such bodies act at all; but in this case, as in the Lehman case, we need not rest the proposition on general principles alone. The statute of 1893, by the very act of directing certain action to be taken by the mayor and common council, incorporated into the statute the charter of Santa Cruz, prescribing in detail the mode and manner in which alone they could act, and consequently must be construed and read precisely and exactly as if it had said in so many words that the bonds could only be issued to refund an indebtedness of the city, *evidenced by bonds and outstanding warrants thereof, specifically recited and described in an ordinance spread on the records and minutes and transcribed and kept open for public inspection in large, legible, and well-bound books, etc.*

"The city clerk must keep separately, in large, well-bound, "uniform, and suitable books, an ordinance record, in which "shall be entered, in a good, round, legible hand, all the "ordinances passed by the common council, and approved "by the mayor of the city of Santa Cruz, and said record "shall be signed by the mayor and countersigned by the "city clerk of said city" (charter City of Santa Cruz, Stats. "of Cal. 1875–1876, p. 203, sec. 40).

In this case, even, if possible, more studiously and effectively than in the Lehman case, every feature of the legislation portrays the prevailing and controlling intention and purpose to interpose as a shield between the municipality and those dealing with its agents the important "safeguard against fraud and abuse of power" of a public and definite record, *expressly required by law*, and containing on its face the imperishable and unmistakable evidence of the juris-

diction of the officials, their compliance with their only letter and warrant of authority or their disregard of its limitations and conditions.

For these reasons and because there was no thought or wish to confer a general power to issue bonds and then to superadd conditions *in pais* determinable finally by the officials and concluded by their recitals as by the judgment of a court, the statute is mainly and in all substantials restricted and confined to and deals with matters not resting *in pais* and to be ascertained by perishable evidence in each given case, but with matters intrinsically and necessarily of record and ascertainable and determinable as well and as easily by intending dealers and purchasers as by the city officials.

There is no power given to refund the city indebtedness generally, but strictly and only that indebtedness the evidence of which must appear and can only appear by the written and recorded action of the council; and, then, carrying out the design, the notice of election is not, as usual, left to the will, discretion, or caprice of the officials, but must conform to the statute and distinctly specify the very writings and records evidencing the debt, and the very bonds in every detail which and which alone can be issued and sold.

In this particular case the point is made still clearer, if possible, by the course pursued. It must be admitted that on one proposition the law is settled—that is, that no recitals can control or estop the municipality in regard to matters appearing on the face of the bonds. In the Sutliff case (147 U. S., 230), the statute required the officials in submitting the question to the voters to enter of record an order specifying the amount required, etc., and the court said that it was clear that the plaintiff, though a purchaser for value and before maturity, was charged with the duty of examining the record provided for in the statute in order to ascertain whether the bonds increased the indebtedness beyond the limit, and "that the recitals in the bonds

"did not estop the county to prove by the records * * * "that the bonds have issued in violation" of the authority, etc., and that in such case there was no implication of authority in the officials to conclude the matter contrary to the facts so recorded.

Now, here, by a perfect parity of reasoning, the statute of 1893 required the officials in submitting the question to the voters to enter of record a statement specifying the indebtedness to be refunded, etc., and equally all purchasers were bound to examine that record in order to ascertain whether the specified indebtedness was such as could be refunded, etc., and no recitals could estop or conclude in that regard. But there has never been any doubt as to whether a statement made or fact appearing on the face of the bonds, whether required to be made by statute or not, prevents a purchaser from relying on recitals to the contrary of that fact if true; and so in the Sutliff case and other cases, some of which are there cited, it is held that when the amount of the bonds is stated on their face, that is sufficient to notify the purchaser. If, in this case, the notice of election had been copied into the bond in full, and so the bond had shown on its face its utter invalidity, it would not be, and is not contended there could be, any recovery. In such case, as, by necessary implication, is laid down in the Sutliff case, the purchaser is required to know the facts contained in the records required by law to be made, and also whatever facts are stated on the face of the bond; and if, by putting both together, he can ascertain or must know that the officials have exceeded their power, he cannot recover; and in Chaffee *vs.* Potter, 142 U. S., 363, it is expressly said: "If the face of one of the "bonds had disclosed that, as a matter of fact, the recital in "it, with respect to the constitutional limit, was false, of "course the county would not be bound by that recital, "and would not be estopped from pleading the invalidity "of the bonds in this particular."

So in Oxford *vs.* McClure, 4 Otto, 429, it is said: "These "bonds, therefore, carried on their face unmistakable evi- "dence that the forms of law under which they purported "to have been issued had not been complied with. * * * "If a purchaser may be, as he sometimes is, protected by "false recitals in municipal bonds, the municipality ought "to have the benefit of those that are true."

The bonds in suit show on their face two things that are true: First. That they are issued for the purpose of refunding the *bonded* indebtedness of the city of Santa Cruz. Second. That they are issued in pursuance of and in conformity with *ordinances* of the city and of a notice of election given as required by the statute, and therefore reciting the indebtedness refunded.

Taking, then, the statute and the face of the bond together, as he must, the purchaser is charged with knowledge that it was only bonds and not warrants that were attempted to be refunded; that the election was called by *ordinance*, and that the ordinance recited and specified the particular bonds, and was made a public record accessible to all, and kept in large, well-bound books, and also (though this is not essential here) that there were like public records, by reference to which he could ascertain whether the bonds recited were outstanding.

Another correspondence between this and the Lehman case is that in both the courts are to construe statutes of California and administer them in the light of the previously settled jurisprudence and course of decision in California. That California doctrine is "that the issuance of bonds is "not within the scope of the general and ordinary powers, "* * * and that such bonds can be legally issued only "by virtue of expressed authority of the legislature;" that if issued without any authority at all they are wholly void, and that "*the character of one void act of "public officers cannot be changed by a second void act of the "same officers declaring the first act to be valid.*" That even

statute *expressly* conferring the power to refund on the board or other officials, and not like that of 1893 giving no *express* power to do anything but *make up a record* of the action of the electors or some other body or tribunal, and couched in the same language, to wit, "having an *outstanding indebtedness evidenced by bonds or warrants thereof*," does not fall within "the line of judicial decisions in cases where the validity of "municipal bonds depended on the happening of some "precedent contingency of fact, and the question was, "whether the officers executing the bonds were vested with "the discretion or power to determine if the contingency "had happened. * * * But * * * the validity of "the bonds * * * did not depend upon any fact—any "matter *in pais*—there was nothing left to the discretion of "the officers, etc."

Sutro *vs.* Pettit, 74 Cal., 332.

And that "*every person dealing in bonds is bound, at his "peril, to inquire whether they were issued in the mode pre-"scribed; and as the mode is the measure of the power, the "bonds would be void in the hands of a holder for value, with-"out actual notice, if issued in any other mode.*"

McCoy *vs.* Briant, 53 Cal., 247.

Construing the statute of 1893 in the light of this doctrine, as was done with the statute in the Lehman case, how can the conclusion be reached that it was the intention of the legislature to commit to the city officials the power to decide whether the bonds refunded and recited in the notice of election were "outstanding bonds of the city," or to conclude by any recitals the question whether the limited and implied power so grudgingly conferred had been followed or exceeded or the mode prescribed disregarded? By adopting the language of the statute construed in Sutro *vs.* Pettit, it is elementary law that the construction was adopted with the language, and every variation between the statute con-

strued in Sutro *vs.* Pettit and the statute of 1893 but reinforces that construction.

It is well settled that the language of a statute is to be construed according to the judicial interpretation previously given to the same or similar language by the highest court of the same State prior to its enactment, and, following this well-settled rule for the construction of State statutes, as held in the recent case of O'Brien *vs.* Wheelock (C. C. A., 95 Fed., 883), Federal courts, in construing State statutes or constitutional provisions, though they are not bound to follow the construction given them by State courts after the rights in controversy in the suit accrued, will give effect to the principles of construction previously established by the State decisions, and will lean toward an agreement of views with the State courts.

It has been said in the cases in the Supreme Court of the United States decided before Dixon *vs.* Field established the correct, if not a new, rule (see opinion of Brewer, J., in Polton *vs.* Board, 33 Fed., 615) that if it be the law that certain facts must appear, the question is, To whom must they appear and when? Who is to decide? etc. But under the statute of 1893 these questions are easily and must be differently answered. By the express mandate of the statute, they must be decided when the notice of election is framed, and must then be made to appear on the face of the record. If the officials were to finally decide and embody their decision in the recitals, there was no necessity for reciting the facts in the notice of election; and even in the first instance, all they could decide was whether to take the decision of the electors on the question of refunding certain specified bonds and issuing other specified bonds. Then, as soon as the electors decided the question submitted, the record was made up and the decisions a finality. There is absolutely nothing in the statute from which can be implied any power to alter, vary, or depart from this decision. The whole *express* power given

by the statute had been exercised and exhausted. Nothing remained but the *implied* power to issue the exact and very bonds described in detail in the recorded decision and action of another and different tribunal—the electors—passing on a definite issue and question made up and presented to them. Unless this be so, it would follow that the statute gave an implied power to vary at will the details, amount, etc., of the *new* bonds, and to ruin the city by issuing them for any amount they saw fit. For this, we presume, no one would contend, and it is to us inconceivable that upon any construction of this statute the legislative intent was to commit to the city officials the power of deciding contrary to the facts plainly apparent on the face of the recorded notice of election what particular bonds were to be refunded, and by the self-same language in the self-same statute to deny them the power to decide in like contrariety what particular bonds could be issued for the very and only purpose of refunding the particular outstanding bonds specified.

We beg leave to repeat and emphasize the controlling facts and consideration peculiar to this case and distinguishing it from all those decided by the Supreme Court which are cited against respondent on this proposition, that by the statute (1893 Cal., p. 59) the whole of the first section down to the words "said bonds shall be sold by such city council, etc.," deals with the making of the record which is to evidence the decision and determination of the electors. From the rest of the section must be *implied* all the power conferred with reference to the issuing of bonds. And that *implication* is limited and restricted and confined to the sale and issuance of the very and identical bonds required by the preceding provisions to be described in minutest detail in the record already made up. The statute is express on this point. It says "said bonds" shall be sold, etc., and it must be construed as if it had said "the bonds so described in said notice may be issued, sold, etc." We cannot imagine that any legislator or proposer or framer

of an act intended to confer the power to make an unlimited issue of bonds, and to decide *de novo* and finally, without reference to any previous action, determination, or record, whether the facts giving the authority to make such unlimited issue existed, phrasing and wording the statute as this is expressed. The legislature is presumed to have known the existing state of the law, especially the previous decisions in California. If such dangerous and unfettered power had been contemplated, if it was the design to reverse the whole policy of the State and change the whole spirit of her jurisprudence, would the very language already construed not to confer this power have been adopted? Would such pains have been taken to cast aside and omit the express grant of power to issue bonds contained in the very statute they were amending? Would any proposal to amend this statute of 1893, when on its passage, by *expressing* the grant of power here sought to be fastened upon it by implication and construction have been even listened to or entertained for a moment? Imagine a legislature gravely providing for a decision by the voters of a question of issuing certain bonds to be specifically described and spread upon the public records, then, after giving authority to certain officials to sell those specific bonds and no others, inserting in the same section of the same act a proviso as follows:

"Providing the city officials shall have exclusive and "final jurisdiction and authority to determine and decide "what the public record already exacted and provided for "does recite and contain, and any recital in the bonds sold "by them shall be conclusive evidence of the contents of "said record and shall estop the city from showing that the "bonds issued and sold are not those described in said rec-"ord, no matter how great may be the excess of the issue."

In the statute in the Sutliff case there was a requirement of a like record to ours, exhibiting in detail the debts, etc., of the county. The Supreme Court, in language which has

never been recalled, said it was clear the purchaser was charged with the duty of examining the record, and that there could be no implication that it was intended to leave that matter to be determined and concluded contrary to the facts so recorded by the officers issuing the bonds, and cite Dixon *vs.* Field to the effect that the requirement of such a record is necessarily followed by the consequence that such purchasers are bound by the record, notwithstanding any recitals in the bond.

It thus appears that the statute of 1893 was drawn so as to meet the views of the Supreme Court, and so as in the plainest way to exclude the implication of any power to vary the record by recitals or otherwise. The statute on its face and by its controlling and most important provisions expressly refers intending purchasers to a record *explicitly* required to contain the authentic and only evidence of the facts made a condition of the lawfulness of the whole proceeding. If this record fails to show the jurisdiction and lawful exercise of the authority attempted to be exercised, *a fortiori*, if it affirmatively shows the contrary, the purchaser is held to knowledge, and there can be no estoppel. The case stands just like those where the statute requires the facts to appear on the face of the bond, as in Barnett *vs.* Dennison, 145 U. S., 135. Here, as there, we can say, the city was merely agent, possessing only such powers as were expressly given *or implied because essential to carry into effect those expressly granted*, and that the provisions of the statute must be strictly pursued, and the purchaser is chargeable with notice of the requirements of the statute.

Now, here the only *express* power was to frame and make of record a notice showing the facts on its face, and then, if the electors so decided, there was at most an *implied* authority to sell the very bonds specified. This, we may concede, for the sake of argument only, could be implied, because essential to carry into effect the express

grant of power. But by what process of reasoning can it be said that the further power to vary the record by recital must be implied as *essential* to carrying out the express grant? The very making of any operative recitals must affirm on the face of the bonds that the record required by the statute was made, and would thus as fully and effectually as a compliance with the statute in Burnett *vs.* Dennison inform the purchaser of all the facts necessary to enable him to know for himself whether the bonds were issued in accordance with law. What possible difference can it make in principle whether this statute required the face of the bond to specify the bonds to be refunded and those to be issued, or required the notice of election to make the same facts a matter of record? In the latter case, to protect the purchaser, there must be a recital on the face of the bond that the notice of record did state the facts, and therefore, by intendment of law, the very face of the bond must, in the language of the supreme court, inform the purchaser that "there could be no implication that it was intended to "leave that matter to be determined and concluded, con- "trary to the facts so recorded, by the officers charged with "the duty of issuing the bonds."

Sutliff *vs.* Board, *supra.*

Here the requisite facts were not of a nature requiring examination and decision. They were like the assessed valuation of property, the consent or non-consent of the county in the Toledo case, the record of indebtedness in the Sutliff case, matters already determined and of record, extrinsic facts, themselves conferring the implied power to issue the bonds. The statute does not confer express power to issue bonds generally and then affix conditions precedent, resting *in pais* and requiring examination and decision, but leaves the whole question and grant of power to an implication arising upon an extrinsic record, express power to make which is conferred. The pur-

chaser cannot find in this statute any express power to issue bonds and infer that the conditions to its exercise have been fulfilled. He simply finds and *is told* by the statute in so many words that certain bonds described in a certain record, accessible to all, shall be sold, *provided* that record recites an outstanding bond or bonds of the city as that to be redeemed or refunded by the sale. He is not led to believe *that anything* is left to the decision of the officials, but put on his guard and made to know that by the very proposition to sell they affirm that their only power and authority is already fixed and determined by a public record setting forth all the facts.

One distinction here to be noticed is somewhat analogous to that beween a court or tribunal invested with *general* jurisdiction over a certain subject-matter, whose decisions within the scope of their jurisdiction import verity and cannot be collaterally attacked, and a jurisdiction which is special and can only arise or be exercised within certain defined limitations or upon the existence of certain extrinsic facts. In the latter case the tribunal can never give itself jurisdiction by simply claiming it or erroneously deciding that it has it.

This is well illustrated by the cases where a probate court seeks to administer upon the estate of one living. The statute gives jurisdiction over the estates of decedents. It has been often argued and nearly as often overruled that such a statute by implication gives power to decide finally the question of life or death.

If this is the rule, even in cases of superior courts of general jurisdiction and where the record shows the jurisdiction on its face, how can there be any question in case of a special tribunal with limited jurisdiction whose decision, on its face, shows the lack or abuse of power? If any such special tribunal was created by this statute of 1893 it consisted not of the outgoing officials, but of the old council *and* the electors, and their determination, as made patent and of

record by the notice of election, is conclusive against the validity of the whole proceeding. The very postulate that a record or judgment or other determination imports verity renders it *felo de se* if, on its face, it shows want of jurisdiction or power. For example, if a superior court of general jurisdiction, in granting probate, should recite the fact that *the alleged* decedent was still living.

So here the contention is that a special tribunal has been created and given power and jurisdiction to decide finally certain facts. That might be argued if the statute gave a *general* and express power to issue bonds and specified certain limitations, formalities, and conditions *in pais* as regulating the exercise of the power.

But where, as here, the only power and jurisdiction conferred is special and to sell certain specified bonds or to refund certain specified outstanding bonds, it is precisely like the grant of power to administer upon certain specified estates. The case, then, is like the cases of Sutro *vs.* Pettit and Lehman *vs.* San Diego. In such case, as said in Sutro *vs.* Pettit, the power granted being to refund "outstanding indebtedness evidenced by bonds or warrants," no question of the implication of authority to decide upon the fundamental, controlling, and jurisdictional facts, constituting the sole and special grant of power and jurisdiction, can arise, because "the validity of the bonds issued did not depend upon any "fact—any matter *in pais*—to be determined by the super- "visors. The power to issue the bonds and the limitation "of that power, depend wholly upon the language of the "act itself, and not upon any extrinsic contingency; there "was nothing left to the discretion of the officers."

And this very language of the statute, we repeat, was copied into the statute of 1893, thus carrying with it the construction already placed upon it. By all the authorities this has the same effect as if the statute of 1893 had *in terms* enacted into the statute all the language quoted from Sutro *vs.*

Pettit, and had thus expressly repudiated the implication of jurisdiction now sought to be fastened upon or injected into the statute by mere interpretation and construction.

"It is undoubtedly a question of local policy with each "State what shall be the extent and character of the powers "which its various political and municipal organizations "shall possess; and the settled decisions of its highest "courts on this subject will be regarded as authoritative by "the courts of the United States."

Claibourne *vs.* Brooks, 111 U. S., 400.

The contents of this notice of election (setting forth, among other things, the proposed refunding of $89,000, par value, of the mortgage bonds of a private water company, Findings Nos. 5 and 6, Rec. pp. 35–'7; Add. Fdg. No. 2, Rec., p. 65) have the same force and effect as the newspaper publication in McClure *vs.* Oxford, and the reasoning of the court applies here (4 Otto, 429). We submit it is shown that this case falls within Dixon *vs.* Field and the class to which it belongs and not within Chaffee *vs.* Potter and kindred cases, and that, moreover, the special terms and framework of our statute and the settled previous doctrine of the California courts take it out of all the cases cited by petitioner; also, that we have already sufficiently marked out the distinction between this case and Hackett *vs.* Ottawa and other Federal cases cited on the effect of recitals merely referring to ordinances.

In Hackett *vs.* Ottawa, 99 U. S., 86, there was a *general* power and jurisdiction conferred. The power was expressly given to borrow money and to issue bonds therefor. The court said: "No limitation is prescribed as to the amount "which may be borrowed. Nor is any express restriction "imposed as to the objects or purposes for which bonds "may be issued." There was no provision in the statute requiring the ordinance or the notice of election to contain any statement or recital as to the *purposes* for

which the bonds were to be issued or in any other way providing for any record of the facts made in obedience to express requirement of the statute. There was, therefore, nothing in the statute or on the face of the bonds or in the recitals directing purchasers to any record of the facts. They were not required to know that there was a record showing whether the bonds were issued in compliance with the statute. They were expressly assured that there was none showing any failure to comply. The court said the bonds would have been good *if they had made no reference to the ordinance*, etc.; but in our case these bonds would have unquestionably been invalid without a reference to or recital of the notice of election. At least, there must have been a recital of compliance with the statute, which could have been held *ex vi termini* to import and certify that there was a recorded notice of election setting forth all the essential and jurisdictional facts which we contend show the want of jurisdiction and flagrant departure from the statute in attempting to refund private debts. All the case decided was that the recitals could not be contradicted *as to the purpose for* which the bonds were issued, where there was no requirement that such purpose should appear on the face of the proceedings. If the statute in Hackett *vs.* Ottawa, instead of giving a general power and jurisdiction, had provided that an ordinance might be passed specifying the *purpose*, etc., and then that the bonds specified in the ordinance might be sold, etc., the case would have been something like this instead of being, as it is, its very antithesis, and under such a statute it must have been differently decided or overruled by the subsequent line of cases like Dixon *vs.* Field and the Sutliff case.

Risley *vs.* Village of Howell, 64 Fed., 453; 57 Fed., 544, is subject to the same explanation. It follows and is professedly based upon Hackett *vs.* Ottawa, from which it is said not to be distinguishable. In both cases all that is decided is that the mere circumstance that an

ordinance sets forth facts showing an unlawful *purpose*, when there was no statutory requirement that it should say anything on the subject, does not, when recited, impose on the purchaser the duty of examining something the statute gave him no warning would afford him any material or reliable information. By the statute and recitals in Risley *vs.* Howell the purchaser (*that court thought*) had a right to conclude that the bond had been properly issued and sold in strict accordance with law, and that with the purpose or act of the municipal officers in the subsequent disposition of the proceeds of the sale he had no concern. In other words, that he was not bound to see to the application of the purchase-money. The pertinent thing in this case of Risley *vs.* Howell is the reference to the Sutliff case, which shows how the case would have been decided had the Michigan statute resembled ours. The reference then would have read: "The case of Sutliff *vs.* Lake "Co., 149 U. S., 230, is a case of the same character as the "one before us. The bonds in suit were part of an issue "in excess and violation and utter disregard of the power "and jurisdiction prescribed by the statutes; and, as the "public records, to which the purchaser had access, disclosed "the lack of power, he is bound by the facts disclosed by "them, notwithstanding the recital in the bonds that they "were issued in conformity with the statute."

Another case cited on this point is Evansville *vs.* Dennett, 161 U. S., 434. Much that we have said applies to this case. In addition, we may say confidently that it was not intended to overrule or in any way or degree detract from Dixon *vs.* Field, the Sutliff, and like cases. If there had been any such thought, those cases would certainly have been at least alluded to, especially as they have been so often before and since mentioned and treated as embodying the settled doctrines of the Supreme Court. Evansville *vs.* Dennett is one of a class of cases in which a town, city, or other municipality has power to issue bonds

under a certain charter or statute, and also erroneously claims and asserts power to issue them under some other statute. In such cases it is held that the recitals that the bonds are issued under the statute which does not, in fact, give the power do not invalidate the bonds if there was some other power, charter, or statute under which they might properly have been issued. Thus in Evansville *vs.* Dennett there was power under the charter to issue the bonds on a petition of voters or tax-payers presented to the council. There was also a statute allowing the bonds to be issued pursuant to a vote previously had. The statute, in fact, as it turned out, was not operative, as having been repealed or for some other reason. The council, however, passed a resolution declaring that the bonds were issued under the statute and upon a vote, as the ordinance or resolution did not purport to show, and did not show, that any petition had been presented, and in fact none was presented. The question presented to the Supreme Court was whether a recital in the bonds that they were issued pursuant to an ordinance affected purchasers with notice of the terms of the ordinance and imposed upon them the duty of examining the ordinance. It was held that it did not, and that the purchasers had a right to act upon the supposition that the ordinance conformed to the charter, the only valid statute conferring power to issue the bonds, and that therefore the requisite petition had been presented.

Now, evidently this is simply following Hackett *vs.* Ottawa. There was nothing in the statute or in any of the statutes requiring the petition to state the jurisdictional facts and making such statement a matter of record, public or otherwise. Whether the petition was presented and whether it was a proper petition was left a matter *in pais*, and there was no requirement that any ordinance or resolution should in any way refer to it or make it a matter of record. The decision that the recital implied and assured the purchaser that the ordinance complied with the

statute, in the very nature of the case, could only be a decision that the ordinance contained everthing that the statute required it to contain. It certainly did not and could not decide that if the statute had expressly required that the ordinance should recite the petition, the recital would imply that it did not recite it. It may be that the recital implied and even proved that the petition had been presented. That would be simply because, as there was no express statutory requirement on the subject, the matter of the presentation of the petition was left *in pais* and to the determination of the officials issuing the bonds. The ordinance could fully conform to the statute and to every requirement of law and still be utterly silent as to the presentation of the petition. It was the Hackett case over again—simply that the gratuitous and unnecessary statement of a fact in an ordinance did not make the recital of that ordinance notice to the purchaser of the fact. The case must stand just as it would have stood if the ordinance had in all respects complied with the statute, and had not, without any requirement of the statute compelling it, stated any matters showing non-compliance with the law. In the case we are discussing, for instance, the ordinance stated erroneously and mistakenly that the proceedings were held under an invalid statute, and did not state a compliance with the charter; but there was no statutory requirement that the ordinance should say anything about either. The case is the same as if a council having perfect authority to issue bonds under a valid statute should foolishly and mistakenly and unnecessarily pass an ordinance reciting the provisions of an invalid statute, and that they were proceeding under that, and then issue the bonds, with proper recitals that they were issued in conformity to the law and also in pursuance of ordinances, the general recital would control, according to Evansville *vs.* Dennett.

The language of the court in Evansville *vs.* Dennett, 161 U. S., 443, 444, clearly shows that we have correctly interpreted that case, and plainly distinguishes it from ours and

such cases as Dixon *vs.* Field and the Sutliff case, which are not mentioned or referred to, as they certainly would have been had the statute of Indiana been anything like ours. This, we submit, is self evident unless some reasonable and sensible distinction can be drawn between a statutory requirement of a public record accessible to *all* and contained in legible, well-bound books kept by the city itself and any other public record like that of assessed valuation, registry of voters, etc., passed upon in the cases relied upon by petitioner, and even such a distinction would not reach the record in the Sutliff case; but there is no such distinction. *All the reasons* given apply equally to any "express and definite record of a public character." As appears from the language above referred to (161 U. S., 443, 444), there were two statutes—one invalid, providing for an election; the other, the charter, valid, but requiring a condition *in pais*, nowhere required to be recited or embodied in any record of any kind or nature, to wit, a petition of two-thirds of the resident freeholders. The court thought that the question whether there was a petition, whether it was signed by the requisite freeholders, etc., like other conditions *in pais*, was *intended by the legislature* to be left to the determination of the officials; that it was not necessary or required by the statute that such determination should appear of record or by ordinance or otherwise than by a recital in the bonds; that a mere recital of compliance with the charter concluded the question, and that, though there was an unnecessary and superfluous recital of an ordinance, the purchaser had a right to assume, even if he had seen the ordinance, that the election under the invalid statutes was a harmless surplusage, and that, as recited, both methods were pursued, and both the valid and invalid statutes complied with. The ordinance did *not* show, as does the notice of election in the case at bar, *affirmatively* a want of jurisdiction or abuse of power. It merely *failed* to show or make matter of record

a fact which no statute required the ordinance even to allude to, and which the statute did not contemplate the entering of upon any record. According to the views of the court, the bonds would have been equally good if the ordinance had been equally silent as to the petition and the election, and the recital had simply been a compliance with the charter, omitting all reference to the invalid statute and the ordinance. This was merely following the Hackett case. The holding that the recital imported that the ordinance was in conformity with the statute is entirely consistent with the doctrine of Dixon *vs.* Field, the Sutliff case, and like cases. In those cases an express recital that the records in question existed and fully conformed to the statute requiring and providing for them would not have varied or influenced the result except by furnishing an additional ground for the same decision. If the express recital in the case at bar of the notice of election imports its conformity with the statute prescribing its contents, it thereby imports that the record thereof absolutely furnished the exhaustive and conclusive proof of the power of the officials in regard to issuing the bonds and the sole test of the regularity of its exercise. It does not present a case like Evansville *vs.* Dennett, where, notwithstanding the ordinance recited fails to show the power and jurisdiction affirmatively, there was still another source of power not alluded to in the ordinance under which the proceedings might have been regular, and which did not require the facts calling it into existence and justifying the action taken to be specially or otherwise recited and spread on the records. What would have been the answers to the questions in Evansville *vs.* Dennett, even under the Indiana statute and the Indiana decisions and jurisprudence relied on and followed, if the ordinance had shown affirmatively a lack of power and jurisdiction under both the statute and the charter, we need not consider further. We think noth-

ing special need be said concerning the other decisions relied upon by petitioner, because we submit what we have already advanced applies to and covers them all. In so far as they agree and follow the decisions of the Supreme Court, it certainly does; and if there be any inconsistent therewith, which we think there are not, they are not authority here.

National Bank *vs.* Board, 62 Fed., 789, is fully in line with our contention and well illustrates the differences between this case and all those cited against that contention.

The law always has some reference to common sense and the actual transaction of affairs. No man in his senses would or could in good faith invest in bonds under a statute such as ours without first investigating the notice of election, ordinance, etc. No lawyer would attempt to pass the bonds without calling for these documents. He would, after the first glance at the statute, see that the only power was to sell the particular bonds detailed in the record authorized by law; and, in fact, we find the very first thing called for and examined here was this very record (Additional Finding No. 3, pp. 75–77; Testimony of C. D. Turney, Rec., p. 457; Testimony of F. H. Prince, Rec., pp. 460, 461).

The Mortgage Bonds of the City Water Company of Santa Cruz Included in the Refunding Proposition were not Bonds or Warrants of the City of Santa Cruz.

The judges of the circuit court and circuit court of appeals unanimously agreed that the bonds in question were issued for an invalid purpose, in that they were issued to refund in part the mortgage bonds of a private corporation. This was also conceded by petitioner in both the circuit court and circuit court of appeals, and it was not until counsel for petitioner filed their brief in the circuit court of appeals, on motion for rehearing, that the position was taken that

said mortgage bonds were bonds of the city of Santa Cruz. We do not consider this proposition debatable, particularly in view of the following provision of the constitution of the State of California:

"No county, city, town, township, board of education, or "school district shall incur any indebtedness or liability, in "any manner, or for any purpose, exceeding in any year "the income and revenue provided for it for such year "without the assent of two-thirds of the qualified electors "thereof, voting at an election to be held for that purpose, "nor unless, before or at the time of incurring such indebted- "ness, provision shall be made for the collection of an annual "tax sufficient to pay the interest on such indebtedness as "it falls due, and also provision to constitute a sinking fund "for the payment of the principal thereof on or before ma- "turity, which shall not exceed forty years from the time "of contracting the same. Any indebtedness or liability "incurred contrary to this provision shall be void."

Const. Cal., art. XI, sec. 18.

The mortgage bonds of the private corporation, the City Water Company of Santa Cruz, were not bonds of the city of Santa Cruz. They were not issued by said city; nor were they evidences, either actual or colorable, of indebtedness of said city.

There is no provision or authority of law, either constitutional or statutory, granting power to any city of California to assume the bonded indebtedness of a private corporation, and even if there were, such indebtedness could not be refunded under the enabling act of 1893, which expressly limits the refunding to indebtedness evidenced by bonds or warrants OF THE CITY.

It is well settled that in the absence of express authority, given either by the constitution or the statute, a municipality has no power to issue bonds, and that bonds issued by a

municipality without such statutory or constitutional authority are absolutely void.

Wills *vs.* Supervisors, 102 U. S., 625.
Claiborne County *vs.* Brooks, 111 U. S., 400.
Concord *vs.* Robinson, 121 U. S., 165.
Kelly *vs.* Milan, 127 U. S., 139.
Brenham *vs.* German-American Bank, 144 U. S., 173.
McCoy *vs.* Bryant, 53 Cal., 241.
Sutro *vs.* Pettit, 74 Cal., 336.

We respectfully submit that the petition for writ of certiorari herein should be denied.

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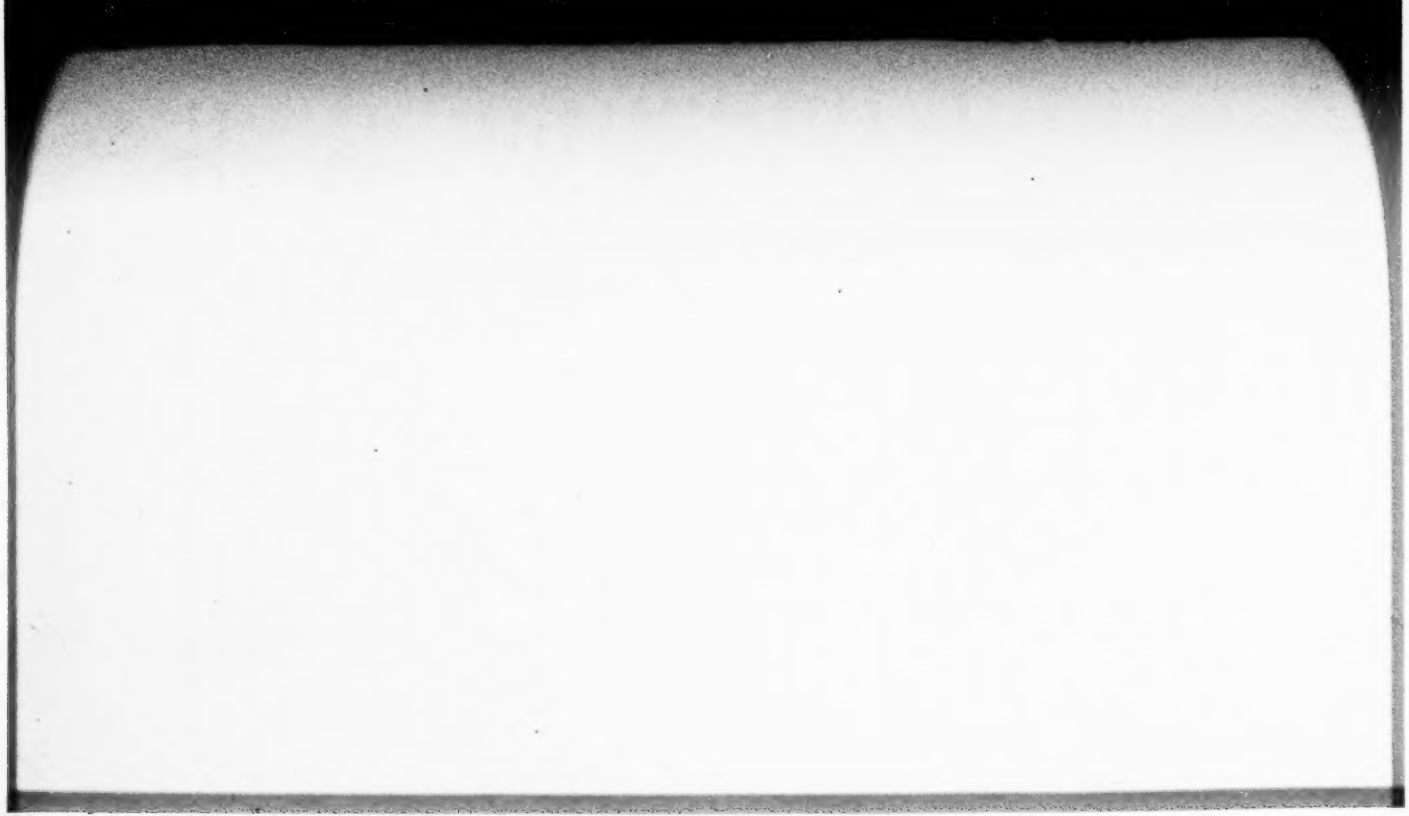

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No. 598.

Supreme Court of the United States

OCTOBER TERM, 1900.

ALBERT H. WAITE, PETITIONER,

vs.

CITY OF SANTA CRUZ, RESPONDENT.

BRIEF FOR RESPONDENT.

STATEMENT OF FACTS.

The action in the circuit court was brought by petitioner to recover from the city of Santa Cruz (respondent here) the sum of $23,100, on account of principal and interest alleged to be due on certain so-called refunding bonds of respondent, issued on or about the 16th day of April, 1894, with interest on the amount claimed to be due from the 15th day of April, 1895, and costs of suit.

Although the amount immediately involved in the ac-

tion is but $23,100, the validity of the entire refunding bond issue mentioned in the pleadings, and amounting to $360,000 with interest, is asserted by petitioner to be involved.

COMPLAINT.

In his original complaint petitioner set forth a separate cause of action upon each of the refunding bonds and coupons sued upon, but, upon the stipulation of the parties, after demurrer filed, petitioner filed an amended complaint stating his entire case as a single cause of action. Said amended complaint (Rec., pp. 3 to 7) alleges in substance:

That plaintiff (petitioner here) is a resident and citizen of the State of Massachusetts; that defendant (respondent here) is a municipal corporation of the fifth class; that on the 13th day of March, 1894, defendant had an outstanding indebtedness of $360,000 or thereabouts, evidenced by the bonds and warrants thereof, and that on said day the assessed value of all taxable real estate and personal property of said defendant city was $3,907,404; that on said day the mayor and common council, pursuant to an act of the legislature approved March 1, 1893, purporting to authorize incorporated cities and towns, other than cities of the first-class, to refund their bonded indebtedness and issue bonds therefor (Stats. 1893, p. 59), submitted to the qualified electors of defendant, at a special election called and held for that

purpose, in the manner in which other elections are held in such city, the question of refunding said outstanding indebtedness; that the notice of such election recited the indebtedness to be refunded; that at such election held on the 13th day of March, 1894, more than two-thirds of the qualified electors of defendant voted in favor of refunding the then outstanding indebtedness of defendant and assented to the execution and issuance of the refunding bonds sued upon; that on the 26th of March, 1894, the mayor and common council passed an ordinance refunding the said outstanding indebtedness; that all acts, conditions and things required by law to be done precedent to the issue of the bonds and coupons sued upon were properly done and approved in legal and due form as required by law; that on April 16, 1894, the defendant, by its mayor and city clerk, thereunto duly authorized, executed the bonds in question; that the bonds were of the character known as "serials," one-fortieth of the principal being payable annually, on the 15th day of April, together with interest on all bonds; that the bonds sued upon were due and payable on April 15, 1895, and that all the coupons sued upon in this action were due and payable on the same day; that before the delivery of the bonds and coupons defendant made provision for the collection of an annual tax sufficient to pay the interest on the same as it should fall due, and also provision to constitute a sinking fund for the payment of the principal thereof as it should fall due; that defendant, by its officers duly authorized, for value received, delivered the

entire refunding bond issue to one Walter Stanton, who afterwards, before their maturity, sold and delivered the bonds sued upon herein, and all of the coupons sued upon herein, to plaintiff; that plaintiff ever since has been, and now is, the lawful owner and the holder of said bonds and coupons, and presented the same for payment at the office of the city treasurer of defendant, but to pay the same or any thereof said treasurer wholly refused and refuses.

DEMURRER.

To this amended complaint defendant presented a demurrer upon the grounds: (1) That said amended complaint does not state facts sufficient to consittute a cause of action; (2) that the act under which the alleged bonds were issued was unconstitutional; and (3) that the complaint was uncertain in certain specified particulars (Rec., pp. 7, 8). The court overruled the demurrer.

ANSWER.

Defendant thereupon answered admitting, so far as a failure to deny is an admission, that plaintiff was a resident and citizen of the State of Massachusetts, and that defendant was at all times mentioned in the complaint a municipal corporation of the fifth class, organized and existing under the statute of the State of California approved March 1, 1866, and a statute supplemental to that of March 1, 1866, approved March 11, 1876.

The first issue joined is upon the allegation that on the 13th day of March, 1894, defendant had an outstanding indebtedness in the sum of $360,000, alleging that the outstanding indebtedness of defendant on said day did not exceed the sum of $270,000, but admits that on said day the assessed valuation of all taxable real and personal property in the said city of Santa Cruz was $3,907,404.

The next issue joined is upon the allegation that the mayor and common council of the city of Santa Cruz, on the 13th day of March, 1894, or at any other time, or at all, submitted to the qualified electors of defendant, at a special election, the question of refunding the outstanding indebtedness of defendant.

The next issue is upon the denial that any notice of such special election was ever given or published.

The next issue is raised by the denial that on the 13th day of March, 1894, or on any other date or day, two-thirds of the qualified electors of defendant voted in favor of refunding such or any indebtedness, or assented to the execution or issue of the bonds described in plaintiff's complaint.

The next issue is raised by the denial that on March 26, 1894, or at any other time, the mayor and common council of defendant adopted an ordinance providing for the refunding of its said indebtedness.

The next issue is raised by the denial that all acts, conditions and things, or any act, condition or thing, required by law to be done precedent to the issuance of the alleged bonds and coupons were or was done or approved.

The next issue is raised by the denial that on the 16th of April, 1894, or on any other day or date, the city of Santa Cruz, by its mayor and city clerk, or otherwise or at all, executed the refunding bonds described in the complaint. In connection with this denial it is admitted that on or about the 16th day of April, 1894, one William T. Jeter and one O. J. Lincoln, as mayor and city clerk of the city of Santa Cruz, did, but without right or authority, sign certain documents purporting to be refunding bonds, and which signatures were wholly unauthorized. In this connection, it has been admitted by stipulation that the signatures of William T. Jeter and O. J. Lincoln affixed to the bonds and coupons sued upon are genuine (Rec., p. 60), but it is not admitted that Mr. Jeter was at the time of signing the mayor of Santa Cruz, nor that O. J. Lincoln, as city clerk, was in any way authorized to sign.

The next issue is raised by the denial that the defendant, by its officers or otherwise, for value received or otherwise, delivered the refunding bonds, or any bonds of defendant, to one Walter Stanton, or to any person whomsoever. In connection with this denial, defendant alleges that on or about the date alleged by plaintiff the

documents alleged by plaintiff to be refunding bonds of the city of Santa Cruz, and all of them, were, by one Walter Stanton, stolen, taken, and carried away from the city clerk of Santa Cruz.

The next issue is raised by the denial that Walter Stanton, before the maturity of the alleged bonds and coupons sued upon, sold and delivered the same, or any of them, to plaintiff. In this connection the stipulation of the parties and the evidence adduced show that Walter Stanton did sell and hypothecate the documents in question to divers persons, who afterwards, and before the commencement of the action, transferred the same and all of them to plaintiff without any money consideration, but for collection merely (Stipulation, Rec., p. 60).

The next issue is raised by the denial of the allegation of indebtedness on the part of the defendant to plaintiff; but, as payment is not alleged, of course that issue depends upon the determination of the other preceding issues.

The next issue is raised by defendant's affirmative allegation that at the time of the alleged election on the question of refunding the outstanding indebtedness of defendant, defendant had no outstanding indebtedness, evidenced by either bonds or warrants thereof, which was either due or payable or subject to refunding.

The next issue is raised by the affirmative allegation of

defendant that, at the time of the alleged election on the question of refunding the outstanding indebtedness of defendant, evidenced by regularly issued and valid bonds and warrants, was only $39,000. That allegation was based upon the theory that the municipal bonds of the city of Santa Cruz dated January 15, 1889, then outstanding to the amount of $225,000, were invalid and void because issued and sold after the law authorizing their issuance and sale had been repealed.

The next issue is raised by the affirmative allegations showing the invalidity of the 89 so-called first mortgage bonds of the City Water Company of Santa Cruz, a private corporation, for the payment of which, in part, the so-called refunding bonds of the city of Santa Cruz were issued. This issue involves several allegations on pages 12, 13 and 14, in which allegations another issue is raised upon the assertion that in the ordinance submitting the question of refunding the outstanding indebtedness of the defendant, evidenced by the bonds and warrants thereof, these mortgage bonds of said private corporation, to the amount of $89,000, were included, and that in the ordinance providing for notice of the election upon the question of refunding the same indebtedness of said private corporation was included as part of the indebtedness of defendant to be refunded, and that, by said last mentioned ordinance, the question of refunding was so submitted to the people that it was impossible for any elector to vote for or against the refunding of the actual

indebtedness of defendant, or any indebtedness of defendant, without at the same time voting in the same way for or against refunding said $89,000 indebtedness of said private corporation, the City Water Company.

The next issue is raised by paragraphs 7, 8 and 9 of the third defense, upon the failure of the city clerk to publish the notice of election on the question of refunding the bonded indebtedness of the city of Santa Cruz, as required by City Ordinance No. 315 of the city of Santa Cruz, and the validity of said special election because of such failure of notice and the failure otherwise to hold and conduct the election according to law.

The next issue is raised upon the 11th paragraph of said third defense, on page 15, involving knowledge and notice on the part of the plaintiff at the time of purchasing the bonds of all the facts set forth in that third defense.

The next issue is raised upon the allegations of paragraphs 1 and 2 of the fourth defense, on page 15, that the bonds and coupons in question were stolen from the city clerk of the city of Santa Cruz on the 23rd day of April, 1894, by one Walter Stanton, and that plaintiff, at the time of his purchase of said bonds, had knowledge and notice that the bonds were so stolen, and that the city of Santa Cruz had never received any consideration therefor.

The next issue arises upon the allegations of para-

graphs 1, 2, 3, 4, 5, and 6 of the fifth defense, on pages 15 and 16 of defendant's answer, wherein it is alleged that the so-called refunding bonds, dated April 16, 1894, were invalid and void because, with the then outstanding bonded indebtedness of the city of Santa Cruz, they constituted an unlawful over-issue amounting to more than 15 per cent. of the assessed value of all taxable real and personal property in the city of Santa Cruz, and that plaintiff, at the time of his purchase of the bonds and coupons sued upon in this action, had full knowledge and notice of this over-issue.

The next issue is raised by the allegations of paragraphs 1, 2, 3, and 4 of the sixth defense, on pages 16 and 17 of defendant's answer, wherein it is alleged that the so-called refunding bonds were not sold by the city of Santa Cruz, nor by any officer or person representing the city, for not less than their face value in United States gold coin, as required by law, or for any value or sum or consideration whatever, to Walter Stanton, or to any other person; that said bonds were fraudulently taken by said Walter Stanton from the custody of the city clerk of the city of Santa Cruz on or about the 24th day of April, 1894, without any consideration whatever, and by said Walter Stanton appropriated to his own use; and that plaintiff, at the time of purchasing said bonds, had full knowledge and notice that said bonds had been fraudulently taken from the city of Santa Cruz, without consideration.

TRIAL AND DECISION.

The case was thereupon tried and submitted to the court for consideration and decision (a jury trial having been duly waived by written stipulation of the parties before the commencement of the trial), and was afterwards decided by the court in favor of the plaintiff (petitioner here) by its findings of fact filed on September 29, 1898, and its additional findings of fact filed December 1, 1898, *nunc pro tunc* as of September 29, 1898.

The special findings of the court, determining the issues raised by the pleadings, are, in substance, as follows:

1. That all of the bonds and coupons sued upon were assigned to plaintiff before the commencement of the action (Rec., p. 18).

2. That plaintiff did not pay any money consideration for the bonds, but that they were assigned to him for collection only (Rec., p. 18).

3. That the Northern Counties Investment Trust Company, Limited, one of the assignors of plaintiff, had notice at the time of purchasing the bonds that the same had been illegally issued by the city of Santa Cruz (Rec., pp. 18, 19).

4. That the defendant was, at all times, a municipal corporation of the fifth class organized as alleged in plaintiff's complaint (Rec., p. 19).

5. That on March 13th, 1894, defendant had an outstanding bonded indebtedness of $271,000; that the value of taxable real estate and personal property in said city was then $3,907,404; that on said date, at a special election held for that purpose, under certain ordinances previously enacted, the question of refunding certain outstanding indebtedness, evidenced by bonds and warrants of the city, and also including therewith the question of refunding 89 First Mortgage Bonds of the corporation known as the City Water Company of Santa Cruz, each of said mortgage bonds being of the face value of one thousand (1,000) dollars, and secured by a mortgage or deed of trust upon the City Water Works of Santa Cruz, purchased by the defendant city from said City Water Company of Santa Cruz prior to said 13th day of March, 1894 (Rec., p. 19).

6. That Ordinance No. 315 of defendant city, dated February 26th, 1894, provided for notice to be given of said election by the publication of a notice thereof, in the form prescribed by said ordinance, in the "Santa Cruz Surf" and "Santa Cruz Sentinel," for not less than ten days before the 13th day of March, 1894, and to be posted at each place of election for the same period; that said Ordinance No. 315 required the notice to state that the polls of such election would be open at sunrise in the morning of said day of election, and should close at 5 o'clock p. m. of said day. That the polls were opened and closed at the hours named in said ordinance; that more

than two-thirds of the qualified electors of defendant city voted in favor of refunding the then outstanding bonded indebtedness of defendant, and also of refunding the said 89 First Mortgage Bonds theretofore issued by the said corporation, the City Water Company of Santa Cruz (Rec., pp. 19, 20).

7. That the only notice given of said election was the publication of said ordinance in the papers named, for the length of time prescribed, and posting copies of the ordinance at each place of election for the same period (Rec., p. 20).

8. That, on March 26th, 1894, Ordinance 320 was duly enacted, providing for refunding the indebtedness specified in ordinances Nos. 314 and 315, and issuing bonds therefor; and setting forth in said finding the substance of said Ordinance No. 320, containing, among other things, the form of recital to be incorporated in each of the refunding bonds, the manner in which the bonds should be sold, and provisions for the annual tax to pay the interest and maturing installments of principal (Rec., pp. 20 to 22, inc.).

9. That, on April 11th, 1892, William T. Jeter was duly elected Mayor, and certain others were elected members of the common council; that they duly qualified for their respective offices within ten days after said election, and entered upon the duties of their offices. That the charter of the defendant city provides that the mayor

and common council of said city shall hold their offices for the term of two years, and until their successors are duly elected and qualified; that on the 9th day of April, 1894, Robert Effey was duly elected mayor to succeed Jeter, and duly qualified at such between 11o'clock a. m. and 2 o'clock p. m. of April 16, 1894; that certain other persons were, at the same time, elected members of the Common Council and qualified on said 16th day of April, 1894; that Jeter and the mebbers of the old common council continued to act as mayor and members of the common council until May 7th, 1894, without protest from any person, and held seven meetings of said Council between and including the 16th day of April, 1894, and the 7th day of May, 1894 (Rec., p. 22).

10. That on April 16, 1894, the acting mayor and council, having received no bids for the refunding bonds in question, accepted a proposition, previously made by Coffin and Stanton, to take all of said bonds upon condition that they should furnish satisfactory securities for the faithful performance of the agreement contained in the proposition, which proposition to sell the refunding bonds, in question, and apply the proceeds to the cancellation of outstanding bonds, is set forth in full in said finding (Rec., pp. 22, 23).

11. That, on April 23rd, 1894, the acting mayor and council, without protest or opposition, approved the bond of Coffin and Stanton, and ordered the said clerk to deliver the said refunding bonds to Coffin and Stan-

ton, and they were so delivered on April 24th, 1894 (Rec., p. 23).

12. That all of the assignors of plaintiff, other than the Northern Counties Investment Trust Company, Limited, and E. G. and E. Wallace, were bona fide purchasers of the bonds assigned by them to plaintiff; that E. G. & E. Wallace received certain advice and information concerning the bonds, notwithstanding which they had no actual knowledge or actual notice of the invalidity of the bonds, nor of any facts tending to impeach the truth of the recitals contained in the bonds (Rec., p. 24).

13. That all of the bonds and coupons, sued on, were in the form alleged in the complaint, and were duly attested, dated, and signed, but some of said bonds were signed by William T. Jeter on April 16, 1894, after the qualification of his successor in the office of mayor (Rec., p. 24).

14. That all of the bonds and coupons, sued on, matured April 15, 1895, and no part of the same has been paid (Rec., p. 24).

15. That Coffin and Stanton never complied with their agreement, upon which the said refunding bonds and coupons were delivered to them, and the city of Santa Cruz never received any consideration on account of the issuance of said bonds (Rec., p. 24).

The court afterwards, in connection with its order denying defendant's motion for a new trial, made its above-

mentoned additional findings of fact, in substance, as follows:

1. Setting forth, literally, Ordinance No. 314, submitting the question of refunding to the vote of the qualified electors of Santa Cruz (Rec., pp. 22 to 32, inc.).

2. Specifying more definitely the notice of election upon that question given by the mayor and common council; that the time fixed for closing the polls and the time at which the polls were closed, at said election, was one hour and fifteen minutes before sunset; that, while more than two-thirds of the qualified electors, voting at the special election, voted in favor of refunding, less than one-half of the qualified electors of said city voted at said election, and also sets forth in full said Ordinance No. 315, providing for the notice of election (Rec., pp. 32 to 39).

3. Amending original finding No. 12 by more fully specifying the notice and knowledge of E. G. & E. Wallace, concerning the procedure had upon the issuance of the refunding bonds in question, at the time of purchasing the bonds assigned by them to plaintiff, and finding that E. G. & E. Wallace, notwithstanding the knowledge acquired by and from persons upon whose opinions they relied in purchasing the bonds, were bona fide purchasers, and had no notice or knowledge sufficient to put them upon inquiry as to the validity of the bonds (Rec., pp. 39 to 41).

4. That a jury trial was duly waived by the stipulation, in writing, of the parties, and also upon the stipulation of the parties an order that the additional findings of fact should be filed *nunc pro tunc* as of the 29th day of September, 1898, the date of the filing of the original findings (Rec., p. 41).

Judgment was entered upon said decision on September 29, 1898, in favor of the defendant in error and against the plaintiff in error for the sum of $22,950, with interest thereon from April 15, 1895, to the date of the judgment, together with costs awarded to defendant in error, amounting to the sum of $685.50 (Rec., pp. 41, 42).

Within the time allowed by law and by the stipulations of the parties and orders of court in that behalf made, plaintiff in error herein presented to the court its proposed bill of exceptions, which was duly allowed, settled, and approved by the court on December 6, 1898 (Rec., pp. 60 to 258).

On December 28, 1898, respondent herein presented its petition for a writ of error, together with its assignments of error, which writ of error was by order of the circuit court of appeals duly allowed on said date; and the bond on writ of error, as required and fixed by order of the court, was duly given and filed on the 30th day of December, 1898. Whereupon the writ of error and citation were duly issued and served, and the answer of the judges of the circuit court of the United States of the ninth judicial circuit, with the record and

all proceedings, were duly certified to said court of appeals on said day.

Thereafter the cause was duly heard and considered by said circuit court of appeals, which (Gilbert, J., dissenting) reserved the judgment of the circuit court, with directions to the court below to "enter judgment " for the defendant (respondent here) on the findings." (Rec., pp. 309 to 316.) On reaching this decision the court of appeals expressly declared that it had not found it necessary "to decide any other point made and " argued by counsel, except that as to the jurisdiction " of the court." (Rec., p. 315.)

QUESTIONS INVOLVED.

Generally stated, the questions involved on the writ of error to the circuit court of appeals in this case, all of which specifically and in detail appear in the specification of errors following, are in substance as follows:

Plaintiff in error contends that the judgment rendered in the circuit court is erroneous and should be reversed, because:

1. The facts stated in the complaint of plaintiff in the court below do not constitute a cause of action at law against the defendant, and the circuit court of the United States has no jurisdiction of the case which is stated, namely, a cause of action to compel certain officers of the city of Santa Cruz to perform duties imposed

upon them by the laws of California. This question arose on defendant's demurrer to the complaint in the court below and upon assignments of error for insufficiency of the findings to support the judgment.

2. The act of the legislature of California known as the refunding act, under which the bonds in question were issued, is unconstitutional, because it is a local and special law relating to a subject concerning which the Constitution of California forbids the enactment of any special or local law; and, also, that said Act is unconstitutional because violative of the provision of the Federal Constitution, which forbids any State from passing laws impairing the obligations of contracts. This question arose also upon defendant's demurrer to the complaint in the court below and upon assignments of error for insufficiency of the findings to support the judgment, and that the judgment is against law.

4. The issuance of the bonds in question was not authorized by the so-called refunding act, nor by any law of the State of California. This question also arose on defendant's demurrer to the complaint in the court below, and upon assignments of error for insufficiency of the findings to support the judgment, and that the judgment is contrary to the findings and against law.

5. The bonds in question were not issued or sold in the manner prescribed and required by law, but in a manner and upon terms and conditions contrary to the law,

rendering them void. This question arose upon defendant's demurrer to the complaint in the court below and upon assignments of error for insufficiency of the findings to support the judgment, that the judgment is contrary to the findings and against law.

6. There is no allegation in the complaint that plaintiff was a bona fide purchaser of the bonds or coupons in question for value. This question arose upon defendant's demurrer to the complaint in the court below.

(All references to the complaint in the court below are to plaintiff's amended complaint therein, upon which issue was joined and the cause tried.)

7. The court erred in overruling several objections, hereinafter specified, made by defendant to the introduction of evidence tending to show that William T. Jeter, who was admittedly the mayor of the city of Santa Cruz until 12 o'clock noon on the 16th day of April, 1894, and for two years prior thereto continued to act as Mayor of the city of Santa Cruz after said 16th day of April, 1894, and after the election and qualification of his successor in office. This evidence was offered upon the trial for the purpose of showing that said William T. Jeter was de facto mayor of the city of Santa Cruz on the afternoon of April 16, 1894, between the hours of 3 o'clock p. m. and 7:30 o'clock p. m. of that day, during which last mentioned period said Jeter signed some of the bonds in question as mayor of the city of Santa Cruz, plaintiff

in error contending in this connection that the court erred in admitting any evidence tending to show that said Jeter was, by the performance, or pretended performance, of any official acts after the completion of the signing of the bonds in question, the de facto Mayor at the time of signing the bonds, namely: between the time of the qualification of his successor in office and the time at which he completed the signing of the bonds in question.

8. The court erred in refusing to make certain additional findings of fact requested by defendant (respondent in error here), and in refusing to amend certain findings of fact at the request of defendant, because the issues upon which such additional findings and amendments to the findings were requested were material, and such proposed additional findings and amendments to findings were supported by all of the evidence in the case relating to such issues, and that there was sufficient evidence to justify and support such additional findings and amendments to findings.

All of these questions arose upon the request of defendant for additional findings and for amendments to findings after judgment, and said alleged errors were duly assigned as errors and are hereinafter specified in detail.

9. The failure of the court to make findings of fact upon certain material issues, the determination of which was necessary to the rendition of a judgment in the

cause, and which the court failed in its special findings of fact to determine. These questions arose after judgment upon assignments of error for insufficiency of the findings to support the judgment, and that the judgment is contrary to the findings of fact and against law, and all of which are hereinafter specified in detail.

10. The findings of fact do not support the judgment, because it appears from the findings of fact that no notice of the election upon the question of refunding the outstanding indebtedness of the city of Santa Cruz and issuing the bonds in question therefor was given or published, as required by law and by the ordinance under which said election was called and held, and that there was, therefore, no election upon the question, and the entire bond issue is a matter of law void, and not merely invalid or voidable. This question arose after judgment upon assignments of error for insufficiency of the findings of fact to support the judgment; that the judgment is contrary to the findings of fact and is against law.

11. The findings of fact do not support the judgment in this: That it appears from said findings that the ordinance calling the alleged election on the question of refunding and issuing the bonds in question required the polls at such election to be closed at 5 o'clock in the afternoon of said day, one hour and fifteen minutes earlier than the time fixed by law (Stats. 1875-76, p.191, Sec. 5), which requires the polls to be kept open at such election

until sundown, which, as shown by the findings, was one hour and fifteen minutes after five o'clock p. m., the time at which the polls were required to be closed by said ordinance, and were actually closed on the day of said election; and it further appears from said findings of fact that while two-thirds of the electors of the city of Santa Cruz voting at said election voted in favor of refunding the indebtedness of said city and issuing bonds therefor, less than one-half of the qualified electors of the city of Santa Cruz had voted at said election at the time when the polls were so illegally closed.

12. The judgment is not supported by the findings of fact, because it appears from said findings that the bond issue of which the bonds and coupons in question constituted a portion was unlawfully issued in excess of the limitation fixed by law, namely, in excess of 15 per cent. upon the assessed value of the taxable real and personal property of the city of Santa Cruz.

13. The findings do not support the judgment, because it appears from said findings that a portion of the bond issue, of which the bonds and coupons in question constitute a portion, were not signed by the mayor of the city of Santa Cruz, but were signed as mayor by a person who was not at that time either de jure or de facto mayor of Santa Cruz, and it appears from said findings that it is impossible to distinguish the bonds so signed after said Jeter had ceased to be mayor of

Santa Cruz from the bonds that were lawfully signed by him while he was mayor of said city.

14. The findings of fact do not support the judgment, because it appears from said findings that the bond issue, of which the bonds and coupons in question constitute a portion, was not made for the purpose of refunding the outstanding indebtedness of the city of Santa Cruz, evidenced by the bonds and warrants thereof as prescribed and limited by the law under which said bonds purport to have been issued, but that said refunding bond issue was made in part, and to the extent of $89,000.00, to pay the mortgage bonds of a private corporation, contrary to the terms of the statute under which the bonds and coupons in question purport to have been issued, and said findings show that it is impossible to distinguish the bonds thus illegally issued for the purpose of refunding the mortgage bonds of said private corporation from the portion of said bond issue which was made for the purpose of refunding the municipal indebtedness of the city of Santa Cruz, evidenced by the bonds and warrants thereof as prescribed by law.

15. The findings do not support the judgment, because it appears from said findings that the bonds in question were not sold to the highest bidder for not less than their face value in gold coin, as required by the statute under which they purport to have been issued, but that they were, contrary to law and to the ordinances providing for the sale of said bonds, delivered to the firm

of Coffin & Stanton to sell the bonds and apply the proceeds to the redemption and refunding of certain outstanding obligations of the city of Santa Cruz and certain outstanding mortgage bonds of said private corporation, the City Water Company of Santa Cruz; and it further appears from said findings that said bonds were never sold as required by law, nor in the manner prescribed by law, and that the said Coffin & Stanton never complied with their agreement with the city of Santa Cruz; that the city of Santa Cruz never received any consideration whatever for said bonds; and that the condition imposed by law upon which alone the said bonds might be issued, sold, and delivered never happened and never existed; that the bonds and coupons in question were, therefore, illegally issued and delivered contrary to the terms of the law, and were therefore void.

16. The findings do not support the judgment in this: That it appears from said findings that the bonds in question, and all of the bonds in connection with which the coupons herein sued upon were issued, contain an unlawful provision making said bonds and the principal and interest thereof a lien upon the real and personal property of the City of Santa Cruz, contrary to the terms of the statute and of the Constitution of California, and rendering said entire bond issue unlawful, invalid and void.

17. The findings do not support the judgment in that it appears from said findings and from the judgment

rendered therein that the court below expressly adjudged the entire bond issue, of which the bonds and coupons in question constitute a portion, to have been unlawfully made and issued and to have been invalid at the time of issuance, because the same were issued in part to refund the mortgage bonds of a private corporation which did not constitute any part or portion of the indebtedness of the city of Santa Cruz, evidenced by the bonds and warrants thereof; and the court finds that the refunding of said mortgage bonds of said private corporation was a matter provided for in the ordinance of the common council of the city of Santa Cruz submitting to the electors of said city the question of refunding its indebtedness and issuing bonds therefor; that the refunding of said mortgage bonds was specified in said ordinance as one of the purposes of said election; said ordinance being a public record required by law to be kept by the city clerk of the city of Santa Cruz, "separately, in large, "well-bound, uniform and suitable books, an ordinance "record, in which shall be entered in good, round, legi- "ble hand all the ordinances passed by the common "council and approved by the mayor of the city of "Santa Cruz, and said records shall be signed by the "mayor and countersigned by the city clerk of said "city" (Stats. 1875-76, p. 203, Sec. 40); and said findings further show that in the ordinance providing for notice of election on the question of refunding the indebtedness of the city of Santa Cruz and issuing bonds therefor the refunding of said mortgage bonds of said private cor-

poration was specified as one of the purposes of said election, said last mentioned ordinance being also a public record of the city of Santa Cruz, required by law to be kept as a public record in the manner above specified; and it therefore appears from said findings that all purchasers of said refunding bonds and all the world had notice by said public records of the facts showing the illegality of said bonds, and that each and every bond and coupon issued under said ordinances, of which the bonds and coupons in question constitute a portion, was invalid and void because of said unlawful and unauthorized provision for refunding the mortgage bonds of said private corporation.

18. The findings do not support the judgment in this: That it appears from said findings that all purchasers of the bonds in question had actual and constructive notice by public records and otherwise of all of the facts showing and constituting the invalidity of said refunding bond issue and of all the bonds and coupons of said issue.

19. The findings do not support the judgment, because it appears from said findings that in the bonds in question, and in each and all thereof, and in each and all of the bonds from which the coupons in question were taken, there were recitals expressly referring to said ordinances of the city of Santa Cruz, thereby inviting inquiry as to such ordinances, an inspection of which would have disclosed the invalidity of all of said bonds

and coupons, because of the unlawful provision for refunding the indebtedness of said private corporation and of the unlawful provision for closing the polls at the election on the question of refunding one hour and fifteen minutes before the time fixed and prescribed by law for closing the polls at such election.

20. The findings do not support the judgment, because it appears from said findings that the entire bond issue was invalid; that such invalidity was shown by public records of the city of Santa Cruz required by law to be kept and open to public inspection, and that the recitals contained in the bonds and found by the court to have been relied on by certain purchasers of the bonds and coupons in question, are untrue and contradict said public records, and relate to matters not committed by law to the adjudication or determination of the persons or officers of the city of Santa Cruz executing the bonds and coupons in question and making such recitals.

21. The findings do not support the judgment, because it appears from said findings that the entire bond issue, of which the bonds and coupons in question constitute a portion, were invalid and void at the time of issuance, and it does not appear from said findings that the purchasers of said bonds and coupons, or any purchaser of any of the bonds or coupons in question, purchased said bonds upon the faith of any recitals or recital contained in any of said bonds, nor that any such purchasers or purchaser relied upon any recitals con-

tained in said bonds for any purpose whatever or at all; but, on the contrary, it appears from said findings that all of the purchasers of nearly all of said bonds and coupons made an independent investigation of the proceedings upon which said bonds and coupons were issued, and of the conditions under which said bonds and coupons were issued, and relied in purchasing said bonds upon such independent investigation and the knowledge and advice thereby obtained, and not upon the recitals, nor upon any of the recitals, in said bonds in purchasing said bonds and coupons.

22. The findings do not support the judgment, because it appears from said findings that said bonds were invalid and void when issued by the city of Santa Cruz; that the city of Santa Cruz did not sell said bonds and never received any consideration whatever therefor; that the plaintiff in this action paid no consideration whatever for said bonds or coupons, or any of them, but took the legal title thereto for the sole purpose of collecting the principal and interest thereof from the city of Santa Cruz for the benefit of his assignors; and it does not appear from said findings of fact what, if any, consideration was ever paid by plaintiff's immediate assignors, or by any prior purchasers of said bonds or coupons, therefor; nor does it appear from said findings of fact to what extent, if at all, the plaintiff, or any of his assignors, or any other person for whom plaintiff holds said bonds or coupons, or any of them, or any person interested in any

way in said bonds or coupons, has been injured through the fault of the city of Santa Cruz in permitting said invalid bonds and coupons to be issued and sold, or to be sold in the market as valid obligations of said city of Santa Cruz, and there is therefore nothing contained in the findings of fact upon which the judgment is based to establish or determine the measure of plaintiff's damage or of defendant's obligation upon the so-called bonds and coupons in question.

23. The findings do not support the judgment, because it apears from said findings that E. G. & E. Wallace, who assigned 150 of the bonds in question, with the coupons attached thereto, to the plaintiff herein for collection, had actual knowledge and notice through their agents and otherwise of all of the facts constituting and showing the invalidity of all the bonds and coupons in question; and said findings further show affirmatively that said E. G. & E. Wallace did not at all rely upon the recitals, nor upon any recital, contained in said bonds, but instituted an independent investigation concerning said bonds and coupons and the proceedings upon which the same were issued, and secured through their attorneys and agents and otherwise full information concerning all of the facts constituting and showing the validity of each and all of said bonds and coupons.

All of the above enumerated questions from 11 to 23 inclusive arose after judgment upon assignments of error for insufficiency of the findings to support the judgment;

that the judgment is contrary to the findings of fact herein and against law, and all of said questions are hereinafter in detail set forth in the specification of errors relied upon in the circuit court of appeals.

CALIFORNIA STATUTES INVOLVED.

The following are copies of the principal provisions of the constitution and statutes of California referred to and discussed in Part Third of this brief:

"Art. I. Sec. 22. The provisions of this constitution "are mandatory and prohibitory, unless by express "words they are declared to be otherwise" (Henning's Const. Cal., p. 47).

"Art. IV. Sec. 25. The Legislature shall not pass "local or special laws in any of the following enumer- "ated cases, that is to say:

"Tenth. For the assessment or collection of taxes.

"Eleventh. Providing for conducting elections, or "designating the places of voting, except on the organi- "zation of new counties.

"Nineteenth. Granting to any corporation, associa- "tion, or individual any special or exclusive right, privi- "lege or immunity.

"Thirty-third. In all other cases where a general law "can be made applicable (Henning's Const. Cal., pp. 71-72).

"Art. XI. Sec. 18. No county, city, town, township, "board of education, or school district shall incur any

"indebtedness or liability, in any manner, or for any "purpose, exceeding in any year the income and revenue "provided for it for such year without the assent of two- "thirds of the qualified electors thereof, voting at an "election to be held for that purpose, nor unless, before "or at the time of incurring such indebtedness, provision "shall be made for the collection of an annual tax suffi- "cient to pay the interest on such indebtedness as it falls "due, and also provision to constitute a sinking fund for "the payment of the principal thereof on or before ma- "turity, which shall not exceed forty years from the time "of contracting the same. Any indebtedness or liability "incurred contrary to this provision shall be void" (Rat- ification declared Dec. 30, 1892).

Henning's Const. Cal., pp. 171-172.

The Act to reincorporate the city of Santa Cruz (ap- proved March 11th, 1876, Stats. Cal. 1875-76, pp. 189- 207) provides:

"Sec. 2. The government of said city shall be vested "in a mayor; a common council, to consist of four mem- "bers," and other officers (p. 189).

"Sec. 3. On the second Monday in April, A. D. one "thousand eight hundred and seventy-six, and biennially "thereafter on the second Monday of April, a charter "election shall be held, at which the legally qualified "voters of said city shall elect the several respective "officers as hereinafter provided, viz: a mayor and four

"councilmen—one from each ward—who shall be elect-
"ors of the wards from which they are chosen, which
"mayor and common councilmen shall hold their office
"for two years, and until their successors are duly elect-
"ed and qualified" (pp. 189-190).

"Sec. 5. It shall be the duty of the mayor and com-
"mon council to call all city elections, to designate the
"time and place of holding the same, giving at least ten
"days' notice thereof. * * * The polls for all elec-
"tions shall be opened at nine o'clock a. m., and shall
"not be closed until sundown of the same day (p. 191).

"Sec. 7. The mayor and common council shall hold
"their regular meetings on the first Monday in each
"month. A majority of all the members elected shall be
"a quorum; and a less number may adjourn from time
"to time, and may compel the attendance of absent mem-
"bers" (p. 192).

"Sec. 9. The common council may adopt rules for
"its proceedings, shall judge of the qualifications of its
"members, keep a journal of its proceedings, compel the
"attendance of its members, and punish for disorderly
"conduct; * * * to pass such ordinances, resolu-
"tions, and by-laws for the regulation of the police
"and entire government of said city as may not be incon-
"sistent with the provisions of this charter, or with the
"constitution and laws of the State or of the United
"States; and any violation of any lawful order, regula-

"tion, or ordinance of the mayor and common council "of the city of Santa Cruz is hereby declared a misde- "meanor; and all prosecutions for the same may be in "the name of the people of the State of California" (pp. 192-193).

"Sec. 10. The common council shall not create, au- "dit, or allow, or permit to accrue, any debt or liability "above the actual revenue or available means in the "treasury that may be legally apportioned and appro- "priated for such purpose; nor shall any warrant be "drawn, or evidences of indebtedness be issued, unless "there shall be sufficient money in the treasury legally "applicable to meet the same, except as hereinafter pro- "vided" (p. 193).

"Sec. 14. The common council shall levy, annually, "a tax upon the real and personal property within the "city. Such levy shall be estimated upon the assess- "ment roll of the preceding year, and shall be for the fol- "lowing purposes, and none other: For the support of "the fire department of the city, a tax not exceeding ten "cents on each one hundred dollars; for the purpose of "sewerage and drainage of said city, a tax not exceeding "ten cents on each one hundred dollars; and for the gen- "eral fund, a tax not exceeding thirty cents on each one "hundred dollars. All licenses, unless otherwise ordered "by the common council, shall be apportioned to the "general fund, and all taxes and licenses herein author- "ized to be collected shall be collected in the same cur-

"rency as may be prescribed in reference to State and "county taxes" (pp. 194-5).

"Sec. 15. The common council shall constitute a "board of equalization, and shall, as soon as the assessor "shall have completed and handed in his assessment, "and after ten days' notice, hold their meeting to hear "and determine all complaints respecting the valuation "of property as fixed by the assessor, and shall have "power to modify and change such valuation in any way "they, or a majority of them, shall deem just and proper. "Said meetings may be held from time to time, as in said "notice specified, for the period of two weeks, and no "more" (p. 195).

"Sec. 40. * * * The city clerk must keep sepa- "rately, in large, well-bound, uniform, and suitable "books, an ordinance record, in which shall be entered, "in a good, round, legible hand, all the ordinances pass- "ed by the common council, and approved by the mayor "of the city of Santa Cruz; and said record shall be "signed by the mayor and countersigned by the city "clerk of said city (p. 203). * * * It shall be his "duty as city assessor, in each year, between the first "day of May and the first day of August, to make out a "true list of all the taxable property within the limits "of said city, which list, when so made out and certified "by him, shall be placed in the hands of the common "council for equalization. The mode of making out "such list and ascertaining the value of property shall

" be the same as prescribed by law for assessing State " and county taxes. He shall apportion the taxes upon " the assessment, and make out and deliver to the city " collector a tax list in the usual form, as soon as prac- " ticable after the common council, as a board of equal- " ization, have equalized the assessments; * * * At " the end of the fiscal year he shall make out a full and " detailed statement of the receipts and expenditures of " the city during said year, specifying the different " sources of revenue, and the amount received from each, " the several appropriations made by the common coun- " cil, and the object for which they were made, and the " amount of money expended under each, evidences of " indebtedness issued, and what portion thereof remains " outstanding, with the rate and amount of interest due " thereon, and the amount of cash on hand" (p. 204).

" Sec. 43. All city officers, whether elected by the peo- " ple or appointed by the mayor and common council, " shall, before entering on the duties of their offices, take " and subscribe the oath of office prescribed by law. All " of such officers, other than the mayor and members of " the common council, shall each, before entering upon " the duties of his office, give a bond, with sureties to be " approved by the mayor and common council, payable " to the city of Santa Cruz, in such sum as may be fixed " by ordinance, conditioned for the faithful performance " of the duties of his office as required by law, and the " ordinances and regulations passed and approved by

"the mayor and common council of the city of Santa "Cruz" (pp. 205-206).

The Act limiting municipal indebtedness (approved March 11th, 1891) provides:

"Sec. 5. No city, town, or municipal corporation "shall incur an indebtedness for public improvements "which shall, in the aggregate, exceed 15 per cent. of the "assessed value of all the taxable real estate and per- "sonal property of such city, town, or municipal corpor- "ation" (Stats., 1891, p. 84).

The refunding act (approved March 1, 1893, Stats. Cal. 1893, pp. 59-60) is as follows:

"CHAPTER XLVII.

"An act to amend an act entitled 'An act to authorize "'the common council, board of trustees, or other gov- "'erning body of any incorporated city or town, other "'than cities of the first class, to refund its indebtedness, "'issue bonds therefor, and provide for the payment of "'the same,' approved March 15, 1883.

"(Approved March 1, 1893).

"The People of the State of California, represented in "Senate and Assembly, do enact as follows:

"Section 1. That section one of the above entitled "Act is hereby amended to read as follows:

"Section 1. That whenever any incorporated city or "town, other than cities of the first class, in this State,

"has an outstanding indebtedness, evidenced by bonds "and warrants thereof, the common council, board of "trustees, or other governing body thereof, shall have "power to submit to the qualified electors of such city or "town, at an election to be held for that purpose, the "question of refunding such indebtedness. Said elec- "tion shall be called and held in the same manner in "which other elections are held in such city or town. "The notice of such election shall recite the indebtedness "to be refunded, together with the denomination, char- "acter, time of payment, rate of interest, as well as all "other details of the bonds proposed to be issued. Such "bonds shall be of the character known as 'serials,' one- "fortieth of the principal being payable each year, to- "gether with interest due on all sums unpaid. Said "bonds may be issued in denominations not to exceed "one thousand dollars, nor less than one hundred dol- "lars; principal and interest being payable in gold coin "or lawful money of the United States, and either at the "office of the treasurer of such city or town, or at a des- "ignated bank situated in the cities of San Francisco, "New York, Boston, or Chicago. Interest upon the "same shall not exceed six per cent. per annum, and "may be payable semi-annually. Said bonds shall be "sold in the manner provided by such city council, or "other governing body, to the highest bidder, for not less "than their face value, in the same character of money "in which they were payable. The proceeds of such sale "shall be placed in the treasury to the credit of the fund-

"ing fund, and shall be applied only for the purpose of "refunding the indebtedness for which they have been "issued. Said common council, or other governing "body, shall, at the time of fixing the general tax levy "for each year, and in the same manner for such tax "levy provided, levy and collect annually, each year, "sufficient money to pay one-fortieth part of the prin- "cipal of such bonds, and also the annual interest upon "the portion remaining unpaid.

"Sec. 2. That section two of said act be amended so "as to read as follows:

"Section 2. Whenever sufficient money is in the "funding fund, in the hands of the treasurer, to redeem "one or more of the outstanding bonds proposed to be "refunded, he shall publish once a week for two weeks in "some newspaper of general circulation published in "such city or town, if there be any, a notice to the effect "that he is prepared to pay such bond or bonds (giving "the number thereof), and if the same are not presented "for redemption within thirty days after the first publi- "cation of such notice, the interest on such bonds will "cease. He shall, at the same time, deposit in the post- "office a copy of such notice, inclosed in a sealed enve- "lope, with the postage paid thereon, addressed to the "owner or owners of such bond or bonds, at the post- "office address of such owner or owners, as shown by the "record thereof kept in the treasurer's office. If such "bond or bonds are not presented within the time speci- "fied in such notice, the interest thereon shall then cease,

"and the amount due be set aside for the payment of "the same, whenever presented. All redemption of bonds "shall be made according to the priority in the order of "their issuance, beginning at the first number. When- "ever such outstanding bonds are surrendered and paid, "the treasurer shall proceed to cancel the same by in- "dorsing on the face thereof the amount for which they "are received, the word 'canceled,' and the date of can- "cellation. He shall also keep a record of such bonds "so redeemed, and shall make a report of the same to the "common council, or other governing body of such city "or town, at least once a month, accompanying the same "therewith by the bonds which have been taken up and "canceled.

"Sec. 3. That section three of said act be amended "so as to read as follows:

"Section 3. All moneys which shall remain in said "funding fund after all outstanding bonds as were pro- "posed to be refunded have been taken up and canceled, "shall be paid into the general fund of such city or town, "and become a part thereof.

"Sec. 4. This act shall take effect and be in force "immediately after its passage."

PART SECOND.

SPECIFICATIONS OF ERRORS RELIED UPON, IN THE CIRCUIT COURT OF APPEALS.

The following is a specification of the errors relied upon in the United States circuit court of appeals and intended to be urged upon the hearing of this cause:

I.

That the circuit court erred in overruling defendant's demurrer to the amended complaint of plaintiff in this action (Rec., pp. 7, 8, 9) for the following reasons, to wit:

1. Because it appears upon the face of said amended complaint that plaintiff (defendant in error) has mistaken his remedy, for the reason that the bonds sued upon in this action, and the interest thereon, were to be paid only out of a special fund to be created for that purpose, in the manner and form prescribed by the statute and under and by virtue of which the refunding bonds are alleged to have been issued, and in accordance with the provision "for the collection of an annual tax suffi-"cient to pay the interest on the same (the bonds) as it "falls due, and also the provision to constitute a sinking "fund for the payment of the principal thereof as it "should fall due," alleged to have been made by the de-

fendant in accordance with the terms of said bonds, and of the law under which they were issued, before the delivery of said bonds and coupons as alleged in the amended complaint, and there is no allegation, either that the special tax prescribed by law was or was not levied, and there is no allegation either that there is money in said special fund applicable to the payment of either the principal or the interest of said bonds, or any of them, nor that there is no money in such special fund. It appears upon the face of said amended complaint that plaintiff (defendant in error) is limited to the special fund provided by law and by the ordinance of the defendant for the payment of his bonds and coupons, and that he has no right to enforce the payment of either the bonds or coupons, or any of them, out of the general assets of the city of Santa Cruz.

2. Because the act of the legislature of the State of California entitled "An Act to amend an Act entitled "'An Act authorizing the common council, board of "'trustees, or other governing body of any incorporated "'city or town, other than cities of the first class, to re-"'fund its indebtedness, issue bonds therefor, and to pro-"'vide for the payment of the same (approved March 15, "'1883),' approved March 1, 1893," by authority of which, and under the terms of which, it is alleged in said amended complaint that the bonds sued upon in this action were issued, is in conflict with the Constitution of the State of California, in that said act is a local and

special law relating to a subject concerning which the constitution of the State of California requires all laws to be general.

3. Because it appears upon the face of said amended complaint that the bond issue in question was illegally made, because in excess of the amount of bonded indebtedness which the city of Santa Cruz could contract under the laws of the State of California in force at the time when said bonds were issued.

4. Because the said refunding act under which said bonds are alleged to have been issued did not authorize the issuance of any bonds by the city of Santa Cruz, for the reason that, while the act in question gives power to the governing body of any city within the classes selected to submit to the qualified electors thereof, at an election to be held for that purpose, the question of refunding its outstanding indebtedness, evidenced by bonds and warrants thereof, and specifies the manner in which said election shall be called and held and the form of notice to be given of such election, there is no provision in the act or in any other act or law of the State of California, as to what shall be the result of a vote favorable to refunding at such election, and that said refunding act does not say, either in terms or in substance, that if the vote at such election be favorable to refunding, the city or its governing body, or its executive head, or any other officer or agent, shall have power to make or issue refunding bonds.

5. Because it appears upon the face of said amended complaint that the said refunding act under which said bonds are alleged to have been issued is unconstitutional, as violative of the provisions of the Constitution of the United States, which forbids any State to pass any law impairing the obligations of a contract.

6. Because said amended complaint does not show that the bonds sued upon were sold by the city of Santa Cruz for their face value in gold coin, as required by said refunding act of 1893.

7. Because there is no allegation in said complaint that the plaintiff was a *bona fide* purchaser, nor that the plaintiff paid any consideration for the bonds or coupons purchased, nor are any facts alleged showing that at the time of any purchase by the plaintiff he had not notice of the validity of said bonds and coupons, nor that he had not notice of facts sufficient to put him upon inquiry as to such invalidity.

8. Because it appears upon the face of said amended complaint that the bonds sued upon, by the terms thereof, are payable in gold coin of the United States, violative of the provision of said Refunding Act of 1893, under which said bonds were issued, which requires that bonds issued under the terms and authority thereof shall be payable in gold coin or lawful money of the United States.

9. Because said complaint does not state facts sufficient to constitute a cause of action.

10. Because it appears on the face of said complaint that the plaintiff was not a bona fide purchaser without notice, in that it is alleged in the complaint that the notice of election therein mentioned was required by the statute of 1893 to, and did, specify the particulars of the indebtedness to be refunded and that the plaintiff had notice of and was bound to take notice of all the terms and conditions of said statute and therefore had notice to put him upon inquiry as to the invalidity of said bonds, as being an attempt to refund what was not such an indebtedness as was allowed by the statute to be refunded; and such inquiry, if reasonably pursued, would have fully informed plaintiff of the invalidity of said proceedings, the same appearing by matter of record provided for by the statute, to wit: The specification aforesaid required to be inserted in said notice of election.

(11). Because it appears on the face of said amended complaint that plaintiff could not rely upon the recitals in said bonds as concluding the questions of the invalidity thereof or as estopping the city from alleging to the contrary in said recitals, and that the matters and facts constituting the validity of said bonds were not by any law committed to the decision of the officials of said city, and the question as to whether the indebtedness attempted to be refunded was such an indebtedness as

could be so refunded under the said statute of 1893 was not one committed to the decision of the officials of the city of Santa Cruz or which could be concluded by any recitals by them made, but was to be determined by an inspection of the record evidence thereof provided for by the statute, and because the said city officials had no power finally or conclusively to determine the question whether the indebtedness proposed to be refunded was such an indebtedness as could be refunded under the said statute (Rec., pp. 3 to 8).

(Errors Assigned, Rec., pp. 259, 260-1-2.)

II.

That the court erred in admitting in evidence a resolution incorporated in a purported record of a meeting of the city council of the city of Santa Cruz, held on the 23rd day of April, 1894 (Rec., p. 148), ordering and directing that the bonds here in question be delivered to Messrs. Coffin & Stanton, the minutes of said meeting showing that William T. Jeter acted as mayor, and members of the old city council, whose successors were elected on the 9th day of April, 1894, and qualified between the said 9th day of April and the 16th day of April, 1894 (p. 203), acted as members of the city council (p. 148).

Defendant objected to said resolution as irrelevant, immaterial and incompetent, and now specifies, in support of said objection, that the resolution appeared from

the face of the minutes to have been adopted by persons who were not legally entitled to the offices the functions of which they exercised at the time. The court overruled the objection; to which ruling defendant then and there duly excepted. The resolution was thereupon admitted in evidence (p. 148), to the prejudice of defendant.

(Error Assigned, Rec., pp. 262-3.)

III.

That the court erred in refusing to make the following additional finding of fact requested by defendant:

"Amend Finding No. 12 by inserting after the words "'E. G. & E. Wallace,' in line 27 on page 10, the follow-"ing: 'Before purchasing said bonds, said firm of E. G. "'& E. Wallace asked for the opinion of some attorney "'in Boston, known to the firm, upon the question of the "'validity of the bonds, and, after consultation, it was "'decided to refer the question to Mr. M. F. Dickinson, "'Jr., an attorney of the city of Boston. Prince & Co. "'thereupon employed and consulted said Dickinson in "'regard to the validity of the bonds in question, and "'submitted to him copies of said ordinances numbered "'314, 315, and 320 of the city of Santa Cruz, after ex-"'amining which said Dickinson rendered a written "'opinion in favor of the validity of the bonds, which "'opinion was furnished to and received by said firm "'of E. G. & E. Wallace prior to their purchase of the "'bonds in question. But said Dickinson did not com-

" 'municate his knowledge of said ordinances, or any of " 'them, to said E. G. & E. Wallace.' As the line and " page of the original finding hereinabove specified do " not correspond in the record with the line and page of " the original findings of fact on file, plaintiff in error " states more specifically that the point in said finding " No. 12 at which the amendment requested as above " stated was to be inserted was after the following words " in said finding: 'The said H. F. Prince & Co. did not " 'communicate their said knowledge to E. G. & E. Wal- " 'lace' " (Rec., p. 24).

The court erred in refusing to make said additional finding for the reason that the same was in strict accordance with and fully supported by all the evidence and testimony on that subject, and there was no evidence or testimony to the contrary, and the said additional finding was required by the uncontradicted and undisputed evidence, to wit: the evidence of Sumner Wallace and the evidence of Frederick H. Prince, as follows:

Sumner Wallace testified as follows (pp. 100-1-2, of the record): "I think F. H. Prince & Co. made no state- " ment to me in regard to the financial condition of the " city or in regard to the validity of the bonds. They " submitted the opinion of Mr. Goldsby, of Santa Cruz, " Cal., and Mr. Gleason, of New York. This was not sat- " isfactory to us, and we asked for the opinion of some " attorney in Boston, and decided to refer it to Mr. M. F. " Dickinson, Jr., attorney for the American Loan &

"Trust Co., and his opinion was obtained, which I have "here. Those opinions being favorable, I purchased the "bonds. I have the opinions of the attorneys upon "which we relied in making the purchase. * * * I "never saw Mr. Dickinson. Mr. Prince brought his "opinion to us. All those opinions were procured by "Prince & Co. or by Coffin & Stanton. The Goldsby and "Gleason opinions were submitted to us without con-"sultation with us, but the Dickinson opinion was ob-"tained, by agreement, after I had said to Prince & Com-"pany that I wanted an opinion from Dickinson."

Frederick H. Prince testified (pp. 245-6-7 of the record): "I suggested to Messrs. Wallace that they buy "the Santa Cruz bonds, and they authorized me to buy "them. I stated to them that Coffin & Stanton in New "York, I thought, were hard up for money, it being then "in the middle of one of our panics, and I thought by ad-"vancing this amount of money he could get them to "buy this manufacturing stock in exchange. Messrs. "E. G. & E. Wallace had spoken to me previously about "selling that Page Belting stock, before I broached this "purchase of the Santa Cruz bonds, and they had told "me I could sell the belting stock if I could. * * * I "don't know whether the Messrs. Wallace made any in-"quiry as to the legality or validity of the Santa Cruz "bonds. We employed attorneys to make investigation "and to give an opinion as to the legality of the bonds. "We employed Mr. M. F. Dickinson. Story & Thorn-"dyke were our private counsel, and they were called

"upon by us to investigate into the legality of these "bonds and to give an opinion. During the long nego- "tiations between July and September, the Messrs. Wal- "lace asked whether we had called upon any attorneys "for their opinion as to the legality of these bonds. It "is always customary in a sale of bonds to give a law- "yer's opinion that the bonds have been properly exam- "ined, and in this case I think there were three opin- "ions. Messrs. Wallace asked us what opinion we had "in regard to the bonds being properly issued, and we "gave them Mr. Dickinson's opinion, and also the opin- "ion of some lawyer in New York, whose name I do not "recollect, and also the lawyer out in California. Coffin "& Stanton sent us all the papers relating to the issue "of these Santa Cruz refunding bonds, and we submit- "ted them to Mr. Dickinson, whom we consulted before "we consulted Story & Thorndyke. * * * In this "case, as I remember it, there was a very full set of "papers, votes, and so forth. I could not swear posi- "tively, but it is my impression that all the ordinances "of the city of Santa Cruz, the advertisements, and the "contract with Coffin & Stanton, were submitted. They "were very careful to send all the papers. That is my "best memory. * * * It is customary in selling "bonds to give a Boston lawyer's opinion in reference "to the same. The opinion of the California lawyer and "the New York lawyer were sent to me with the papers "by Coffin & Stanton. I think Dickinson gave us his "opinion, and then we called on Story & Thorndyke, our

"private lawyers, for their opinion. After we originaliy "got the papers from Coffin & Stanton in connection "with these Santa Cruz bonds, Dickinson asked for cer- "tain papers, which were sent for to Coffin & Stanton, "and they sent them to us. That was subsquently to the "first papers sent us and before Dickinson gave his "opinion. As I remember it, he asked for some papers, "that we sent for them, and they were given to him. "Coffin & Stanton supplied us with all the necessary "sworn statements of all kinds and descriptions. * *"

The said witness, Frederick H. Prince, further testified (pp. 248-9 of the record) that the firm of Frederick H. Prince & Co. had sent the following letter to Messrs. E. G. & E. Wallace before the purchase by said Messrs. E. G. & E. Wallace of the bonds in question:

"Boston, August 31, 1894.

"Messrs. E. G. & E. Wallace, Rochester, N. H.—

"Gentlemen: As instructed by you, we have negoti- "ated with Messrs. Coffin & Stanton to sell to you the "$360,000 city of Santa Cruz, Cal., 5 per cent. bonds, "dated April 16, 1894, at par and interest, they agreeing "to accept in payment therefor 350 shares of Page Belt- "ing Co. preferred stock at par; 520 shares of Page Belt- "ing Co. common stock at 85, and the balance in cash. "The legality of this issue of bonds has been passed upon "by Mr. M. F. Dickinson, Jr., of the law firm of Messrs. "Hyde, Dickinson & Howe, the attorneys of the Ameri- "can Loan & Trust Co., and we enclose herewith his

"written opinion, which kindly return to us for our "files. Please notify us when it will be agreeable to "you to carry through the transaction. Our charge to "you for services in this matter will be $2,500, as already "arranged with Mr. Sumner Wallace.

"Very truly yours, F. H. PRINCE & CO."

(Error Assigned, Rec., pp. 269, 270-1.)

IV.

That the court erred in refusing to make the following additional finding of fact requested by said defendant:

"Amend Finding No. 15 by inserting, after the words "'Coffin & Stanton,' in the first line of said finding, the "words 'immediately after receiving said bonds, sold the "'same, and each and all thereof, but.'"

The court erred in refusing to make said additional finding of fact because the uncontradicted evidence shows that Coffin & Stanton, immediately after receiving the bonds in question from the city clerk of the city of Santa Cruz, sold and hypothecated the same, and each and all thereof, for the sole benefit of said firm of Coffin & Stanton (pp. 90-1, 145-6).

(Error Assigned, Rec., pp. 271-2.)

V.

That the court erred in refusing to make the following additional finding of fact requested by said defendant:

"That the bonds and coupons mentioned and described "in plaintiff's complaint, and each and all of them, were "fraudulently taken by Walter Stanton from the cus- "tody of the city clerk of the city of Santa Cruz on or "about the 24th day of April, 1894, and then and there "by him, the said Walter Stanton, appropriated to his "own use."

The court erred in refusing to make said additional finding of fact, because it appears from the evidence that Walter Stanton procured said bonds to be issued by the city of Santa Cruz, and delivered to him by the city clerk of the city of Santa Cruz, with the fraudulent intent and purpose of appropriating said bonds, and each and all thereof, to his own use and to the use of the firm of Coffin & Stanton, and that immediately after securing possession of said bonds he did appropriate the same, and each and all thereof, to his own use and to the use of his said firm of Coffin & Stanton, and there is no evidence contradictory of or inconsistent with said evidence (pp. 90-1, 148-9, 205-7, 203-4).

(Error Assigned, Rec., p. 272.)

VI.

That the court erred in refusing to make the following additional finding of fact requested by said defendant:

"That each and all of said bonds and coupons mentioned and set forth in plaintiff's complaint were, on or about the 24th day of April, 1894, willfully, unlawfully, and feloniously stolen, taken, and carried away from the possession of the clerk of said city of Santa Cruz by Walter Stanton, a member of said firm of Coffin & Stanton."

The court erred in refusing to make said additional finding of fact, because the evidence shows that Walter Stanton did, on or about the 24th day of April, 1894, obtain possession of the bonds and coupons mentioned and set forth in plaintiff's complaint upon false and fraudulent pretenses and representations, with intent at the time of taking the same from the possession of the city clerk of the city of Santa Cruz, to feloniously steal said bonds and coupons, and appropriate the same to his own use and to the use of the said firm of Coffin & Stanton. And there is no evidence contradictory of or inconsistent with said evidence (pp. 90-1, 145-6, 148-9, 205-7, 203-4).

(Error Assigned, Rec., pp. 272-3.)

VII.

That the court erred in refusing to make the follow-

ing additional finding of fact requested by said defendant:

"That all purchasers and holders of the bonds and "coupons mentioned and set forth in plaintiff's com- "plaint had full notice and knowledge at the time of pur- "chasing the same that said bonds and coupons, and "each of them and all of them, constituted part of an "indebtedness sought to be contracted by the city of "Santa Cruz over and above and in excess of 15 per cent. "upon the assessed value of all taxable real and personal "property in said city of Santa Cruz at the time of the "issuance of such bonds."

The court erred in refusing to make said additional finding of fact for the following reasons, to wit: The undisputed evidence shows that all purchasers and holders of the bonds and coupons mentioned and set forth in plaintiff's complaint had knowledge from the recitals contained in each of said bonds that the same were issued pursuant to certain ordinances of the city of Santa Cruz, and in pursuance of a vote of the qualified electors of the city of Santa Cruz called and held under an act of the legislature of the State of California entitled "An "Act to amend an Act entitled 'An Act authorizing the "'comman council, board of trustees, or other governing "'body, of any incorporated city or town, other than "'cities of the first class, to refund its indebtedness, is- "'sue bonds therefor, and provide for the payment of the "'same (approved March 15, 1883),' approved March 1,

"1893;" and upon a notice of such election alleged in said recitals to have been given and published in the manner required by law. The Constitution of the State of California prohibited said city of Santa Cruz from contracting indebtedness or issuing bonds therefor except upon a vote of two-thirds of the qualified electors of such city by the following provisions of Section 18 of Article XI of said Constitution:

"No county, city, town, township, board of education, "or school district shall incur any indebtedness or lia- "bility, in any manner or for any purposes, exceeding in "any year the income and revenue provided for it for "such year, without the assent of two-thirds of the quali- "fied electors thereof voting at an election to be held for "that purpose, nor unless before or at the time of incur- "ring such indebtedness provision shall be made for the "collection of an annual tax sufficient to pay the inter- "est on such indebtedness as it falls due, and also to "constitute a sinking fund for the payment of the prin- "cipal thereof, within twenty years from the time of "contracting the same. Any indebtedness or liability in- "curred contrary to this provision shall be void."

Said act of March 1, 1893, required the previously existing indebtedness of the city of Santa Cruz, evidenced by the bonds and warrants thereof and sought to be refunded, to be specifically set forth in the notice of election, together with a specific statement of the number,

character, and amount of the refunding bonds to be issued therefor, by the following provision:

"The notice of such election shall recite the indebted-
"ness to be refunded, together with the denomination,
"character, time of payment, rate of interest, as well as
"all other details of the bonds proposed to be issued."

An act of the legislature of the State of California, namely:

"An Act to amend Section 5 of an Act approved March
"19, 1889, entitled, 'An Act authorizing the incurring of
"'indebtedness by cities, towns, and municipal corpora-
"'tions incorporated under the laws of this State, for the
"'construction of water works, sewers, and all necessary
"'public improvements, or for any purpose whatever;'
"and to repeal the act approved March 9, 1885, entitled
"'An Act to authorize municipal corporations of the fifth
"'class, containing more than 3,000 and less than 10,000
"inhabitants, to obtain water works,' also to repeal an
"act approved March 15, 1887, entitled, 'An Act author-
"'izing the incurring of indebtedness by cities, towns,
"'and municipal corporations incorporated under the
"'laws of this State, March 19, 1889,' approved March
"11, 1891" (Statutes of California, 1891, p. 84)—prohibited said city of Santa Cruz from incurring any indebtedness for public improvements in excess of 15 per cent. upon the assessed value of the taxable real and personal property within the corporate limits of said city.

The said provision of said act is as follows:

"No city, town, or municipal corporation shall incur "an indebtedness for public improvements which shall, "in the aggregate, exceed 15 per cent. of the assessed "value of all the taxable real estate and personal prop- "erty of such city, town, or municipal corporation."

Ordinances Nos. 314, 315, 320 of defendant, the city of Santa Cruz, set forth in the findings of fact filed herein and in the bill of exceptions filed herein, each showed clearly upon its face that said refunding bond issue, added to the pre-existing indebtedness of the city of Santa Cruz, evidenced by the bonds and warrants thereof, would constitute an indebtedness of at least $631,000; whereas, the assessment rolls (being public records required by law to be kept by the officers of the city of Santa Cruz) showed that the assessed value of all taxable and real and personal property within the city of Santa Cruz was $3,907,404, as appears in the amended complaint of plaintiff (Rec., p. 3; finding No. 5, p. 19); and said proposed refunding bond issue was in excess of 15 per cent. upon the assessed value of all of said taxable real and personal property in said city of Santa Cruz.

The bonds, upon the their face and by their recitals, gave notice of, and put all purchasers upon inquiry as to, the said fact that said indebtedness exceeded said limit of 15 per cent., and the said recitals in said bonds referred to the vote at the special election, which was a

matter of public record and notoriety, and which showed the said excess over 15 per cent.; and, moreover, as to the bonds purchased by E. G. and E. Wallace, they had further actual notice of said excess by the statement in the attorney's opinions furnished to them, stating expressly the amount of the refunding issue; and moreover, as to the bonds held by John Branch, the Wakefield Trust Company of Wakefield, Rhode Island, the First National Bank of Worcester, Massachusetts, the Albany City National Bank, the South Norwalk Savings Bank of South Norwalk, the Bank of Skaneateles, of Skaneatles, New York, the Kenduskeag National Bank of Bangor, Maine, the National Bank of Waterville, of Waterville, New York, and the First National Bank of Webster, Massachusetts, they had further actual notice of said excess from the circular or prospectus furnished them and each of them by Coffin & Stanton before their taking the bonds in question, which circular or prospectus shows the amount of the refunding bond issue, to wit: $360,000, and that said bonds were issued to refund outstanding bonds of said city of Santa Cruz to the amount of $320,000, issued for the purpose of obtaining water supply, and which said circular or prospectus further shows that the assessed valuation of all the assessed real and personal property in the city of Santa Cruz, at the time of the issuance of the said refunding bonds, was $3,907,400.

(Error Assigned, Rec., pp. 273-5.)

VIII.

That the court erred in refusing to make the following additional findings of fact requested by said defendant:

"That 450 bonds of the denomination of $500 each, "dated January 15, 1889, bearing interest at the rate of "5 per cent. per annum, issued by said city of Santa "Cruz, for purchase and construction of the city water "works, for the refunding of which, to the extent of "$225,000, the refunding bonds mentioned and described "in plaintiff's complaint were in part issued, were, and "each of them was, issued, sold and delivered by the "city of Santa Cruz after the act of the legislature of "the State of California authorizing their execution, is-"suance, sale and delivery had been repealed, namely, "after the 19th day of March, 1889" (Rec., p. 254).

The court erred in refusing to make said additional finding of fact, because it appears from the evidence, without contradiction, that nearly all of said 450 bonds of the denomination of $500 each, dated January 15, 1889, were issued and sold and delivered by the city of Santa Cruz after the 19th day of March, 1889, and that the act authorizing the execution, issuance, sale, and delivery of such bonds was, on the 19th day of March, repealed (pp. 217-18).

(Error Assigned, Rec., p. 275.)

IX.

That the court erred in making, at the suggestion of plaintiff and against the objection of defendant, the following additional finding of fact, as an amendment to Finding No. 12 of the original findings of fact filed in the cause, viz:

"Prior to the purchase of the bonds by E. G. & E. Wal-"lace, Messrs. F. H. Prince & Co. submitted to them a "copy of the following opinion of Z. N. Goldsby, the city "attorney of the defendant, practicing law in the city "of Santa Cruz, California, namely:

"'Santa Cruz, Cal., April 25, 1894.

"'I hereby certify that I have carefully examined all "'the steps taken and proceedings had relative to the is-"'suance of $360,000 in 5 per cent. refunding bonds by "'city of Santa Cruz, in the State of California, and the "'bonds issued pursuant thereto, dated April 16, 1894, "'and find said proceedings regular, and said bonds le-"'gally issued, and a valid and binding obligation of said "'city of Santa Cruz.

"'Z. N. GOLDSBY.'

"And also submitted a copy of the following opinion "of L. B. Gleason, an attorney-at-law, practicing in the "city of New York, namely:

"'Messrs. Coffin & Stanton,

"72 Broadway, New York City

"'Gentlemen: I return herewith certified copies of "'the proceedings of the officials of the city of Santa

" 'Cruz, Cal., with reference to the issuance of the refund-
" 'ing bonds of said city, bearing date of April 16, 1894.
" 'I have made a careful examination of these papers and
" 'of the Constitution and statutes of the State of Cali-
" 'fornia, with reference to the issuance of refunding
" 'bonds by cities of said State. All the provisions of the
" 'Constitution and the statutes of the State seem to have
" 'been most carefully and fully complied with, and from
" 'my examination I am of the opinion that these bonds
" are issued in pursuance of the laws relating thereto,
" 'and are legal and valid obligations of the said city of
" 'Santa Cruz.

" 'Yours truly,

" 'LAFAYETTE B. GLEASON.'

"The copies of the opinion of Goldsby and of Gleason
" were furnished to F. H. Prince & Co. by Messrs. Coffin
" & Stanton. These opinions were not satisfactory to E.
" G. & E. Wallace, and they asked for the opinion of
" some attorney practicing law in the city of Boston. F.
" H. Prince & Co. thereupon suggested that the opinion
" of M. F. Dickinson, Jr., an attorney practicing in that
" city, should be obtained; this suggestion was satisfac-
" tory to E. G. & E. Wallace, and it was then agreed be-
" tween F. H. Prince & Co. and E. G. & E. Wallace that
" the opinion of said Dickinson upon the question of the
" validity of said bonds should be obtained by F. H.
" Prince & Co. F. H. Prince & Co. then, on their own
" account and for themselves, and not acting as agents
" of E. G. & E. Wallace, employed said Dickinson to

"give his opinion in relation to the validity of such "bonds, and as the result of such employment, and as "the attorney of F. H. Prince & Co., Dickinson gave to "F. H. Prince & Co. the following opinion, which was "afterwards by said F. H. Prince & Co. submitted to "E. G. & E. Wallace, prior to their purchase of such "bonds:

"'Boston, August 29, 1894.

"'F. H. Prince & Co.,

"'2 and 8 State Street, Boston, Mass.—

"'Gentlemen: I have examined the papers that you "'have submitted in regard to the $360,000 5 per cent. "'refunding bonds of the city of Santa Cruz, Cal., dated "'April 16, 1894. In my opinion, the bonds are legally "'issued in conformity to the laws of the State of Cali- "'fornia and the ordinances of the city of Santa Cruz, "'and constitute a legal and valid obligation of said "'city.

"'Very respectfully yours,

"'M. F. DICKINSON, JR.'

"Said Dickinson had notice of all the matters recited "in the ordinances of the defendant city, numbered 314, "315, and 320, but Dickinson did not communicate this "knowledge of said ordinances, or of any of the facts "recited therein, to the said firm of E. G. & E. Wallace; "and the said Dickinson, in the examination of such "ordinances, and in giving said opinion, was not the "agent or attorney of E. G. & E. Wallace, but acted

"solely as the attorney of F. H. Prince & Co." (Rec. pp. 254-5-6).

The court erred in making said additional finding of fact, because it appears from the undisputed evidence that E. G. & E. Wallace specifically asked F. H. Prince, of the firm of F. H. Prince & Co., to procure for said firm of E. G. & E. Wallace the opinion of said M. F. Dickinson, Jr., as to the validity of the bonds and as to the regularity of the issuance thereof, and that F. H. Prince & Co. thereupon, not for themselves, but for the firm of E. G. & E. Wallace, consulted and employed said Dickinson, and procured from him, for said E. G. & E. Wallace, the opinion set forth in said finding upon the question of the validity of said bonds and the regularity of their issuance.

Said evidence is not contradicted, and is not inconsistent with any other evidence in the case, and it appears from said evidence that said Dickinson, in the examination of said ordinances and in giving said opinion, was the agent and attorney of E. G. & E. Wallace, and did not act solely or at all as the attorney of F. H. Prince & Co.

(Reference is here made to the testimony of Mr. Sumner Wallace, of the firm of E. G. & E. Wallace, as found on pp. 100-102 of the record, and as set forth in Assignment of Error No. 23 hereof.)

(Error Assigned, Rec., pp. 275-6-7.)

X.

That the court erred in making and finding, at the suggestion of said plaintiff and against the objection of said defendant, that portion of said last mentioned additional finding which reads as follows:

"F. H. Prince & Co. then, on their own account and for "themselves, and not acting as agents of E. G. & E. Wal- "lace, employed said Dickinson to give his opinion in "relation to the validity of such bonds, and, as the result "of such employment, and as the attorney of F. H. "Prince & Co., Dickinson gave to F. H. Prince & Co. "the following opinion, which was afterwards by F. H. "Prince & Co. submitted to E. G. & E. Wallace, prior to "their purchase of said bonds" (Rec., p. 256).

The court erred in making and finding said portion of said additional finding of fact, because said portion of said finding is not supported by the evidence, nor by any evidence in the case, and is contrary to all the evidence upon that subject in the case in this: That all of the evidence upon the subject of the employment of said Dickinson shows that he was employed by F. H. Prince & Co. as the agent of Messrs. E. G. & E. Wallace, not on account of nor for said F. H. Prince & Co., but on account of and for Messrs. E. G. & E. Wallace, the purchasers of said bonds.

(Reference is here made to the said testimony of Sum-

ner Wallace and Frederick H. Prince, as hereinbefore set forth and referred to.)

(Error Assigned, Rec., p. 277.)

XI.

That the court erred in making and finding, at the suggestion of plaintiff and against the objection of defendant, that portion of said last mentioned additional finding which reads as follows: "The said Dickinson, in the "examination of said ordinance, and in giving said opin- "ion, was not the agent or attorney of E. G. & E. Wal- "lace, but acted solely as the attorney of F. H. Prince & "Co." (Rec., p. 256).

The court erred in making and finding said portion of said finding, because said portion of said finding was not supported by the evidence, nor by any evidence in the case, and is contrary to all the evidence in the case in this: That all of the evidence upon the subject of the employment of said Dickinson, and upon the subject of his advice and opinion concerning the validity of said bonds, shows that he was the agent and attorney of E. G. & E. Wallace, and did not act solely or at all as the attorney of F. H. Prince & Co. (pp. 100-102, 246-8).

(Error Assigned, Rec., p. 278.)

XII.

That the court erred in making and finding that por-

tion of Finding No. 8 of the original findings of fact filed herein on September 29, 1898, which is in the words and figures following: "On the 26th day of March, 1894, "Ordinance No. 320 was duly enacted by the mayor and "common council of the defendant" (Rec., p. 256).

The court erred in making and finding said portion of said finding, because the same is not supported by the evidence, nor by any evidence in the case, and is contrary to all the evidence in the case in this: That it appears from the evidence that said ordinance was not duly enacted, in that there had been no election of defendant prior to the 26th day of March, 1894, for the reason that no notice of such election was published or given as required by law (p. 90 of the record), and that the polls at such purported election were closed one hour and fifteen minutes before the time provided by law for closing of the polls at such an election, less than one-half of the qualified electors of the city of Santa Cruz having, up to the time of the closing of the polls, voted at such election (p. 90 of the record). That the bond issue sought to be provided for in said ordinance was not authorized by any vote or action of the people of the city of Santa Cruz prior to the date of the alleged adoption of said ordinance, for the reasons hereinbefore in this assignment of error made and given; that ordinances numbers 314 and 315 of said city of Santa Cruz (Rec., pp. 26-39), submitting the proposition of refunding the alleged bonded indebtedness of the city of Santa Cruz, etc., showed on their face that a part of such alleged indebtedness to be

refunded consisted of indebtedness evidenced by the mortgage of a private corporation, to wit: the City Water Company of Santa Cruz, and that the question of refunding such purported indebtedness of said private corporation was so connected with the indebtedness evidenced by the bonds of the city of Santa Cruz that the electors of the city of Santa Cruz could not at such election vote for the refunding of the bonded indebtedness evidenced by the bonds of the city of Santa Cruz and against the bonded indebtedness evidenced by the bonds of said private corporation, or *vice versa* (Rec., pp. 26, 30-1, 34-5, 37-8).

(Error Assigned, Rec., pp. 278-9.)

XIII.

That the court erred in making and finding that portion of Finding of Fact No. 12 of the original findings of fact filed herein, which is in the words and figures following:

"All of the assignors of plaintiff, other than the one re-
" ferred to in Finding No. 3, and E. G. & E. Wallace, who
" purchased certain of the refunding bonds and coupons
" issued under the circumstances hereinafter set forth in
" this finding, were bona fide purchasers of the bonds
" and coupons assigned by them to plaintiff and sued on
" in this action, and were without notice of any fact tend-
" ing to impeach the truth of the recitals in said bonds" (Rec., p. 24).

The court erred in making and finding said portion of said Finding of Fact No. 12, in that it appears from the evidence that all of the purchasers mentioned in said portion of Finding of Fact No. 12 of the original fiindings of fact herein had notice of the ordinances Nos. 314 and 315, set forth in the additional findings of fact filed herein, by express reference to said ordinances in the recitals contained in each of said bonds, and had knowledge from such ordinances that the refunding bonds in question were issued in part for the purpose of refunding the mortgage bonds of a private corporation, namely, The City Water Company of the city of Santa Cruz; and for the further reason that the remaining portion of the alleged indebtedness to be refunded, a large part, and nearly the whole thereof, other than said private mortgage bonds, was no indebtedness of said city at all, and the 450 purported bonds by which the same are claimed to have been evidenced were void as having been nearly all issued in violation of and without authority of the law after the repeal of the statute under which an attempt was made to issue them, as set forth in Assignment No. 28, and had notice from said ordinances that the election required by law and by the constitution of California to be held upon the question of incurring indebtedness and issuing refunding bonds was not conducted in accordance with the laws of the State of California relating to such elections in the city of Santa Cruz in this: That at said election the polls were to be opened at sunrise and closed at 5 o'clock in the afternoon of the day of election

—one hour and fifteen minutes before the time provided by law for closing the polls at such election, and that no notice of such election was given or published as required by law and the ordinance of said city of Santa Cruz; and that the question of refunding the mortgage bonds of said private water company was so united with the proposition to refund the indebtedness of said city of Santa Cruz, evidenced by the bonds and warrants thereof, that the electors of said city of Santa Cruz could not vote for the refunding of the said indebtedness evidenced by the bonds and warrants thereof and against the refunding of said bonded indebtedness of said private corporation.

And it appears from the uncontradicted evidence that all of the purchasers had notice through said ordinances and through the assessment roll of said city of Santa Cruz that said refunding bond issue constituted an increase of the bonded indebtedness of said city of Santa Cruz to an amount in excess of 15 per cent. upon the assessed value of all taxable real and personal property in said city, and therefore constituted an over-issue of bonds contrary to the limitations imposed upon the contraction of indebtedness and the issuance of bonds on the part of said city of Santa Cruz by the laws of California (pp. 91-146).

It further appears from the uncontradicted evidence that John Branch, of the city of Boston, State of Massachusetts, and the plaintiff's assignor for the collection of one refunding bond, the first coupon of which is sued upon in this action, had actual notice of facts tending to

impeach the truth of the recitals in said bond before coming into possession of it.

John Branch testified as follows (pp. 91-2 of the record):

"I have been the owner of one of the principal bonds "purporting to be executed by the defendant on April "16, 1894, that is, bond No. 297, for $1,000, principal due "1927. About September 1, 1894, I had $1,000 that I "wanted to invest in some strong municipal bond, and "about that time a representative of Coffin & Stanton, a "bond house, as I supposed, of good repute, in New York, "offered me a Santa Cruz bond having a long time to "run, bearing 5 per cent., at par and accrued interest, "at 101, less 1 per cent. commission, and I thought the "bond was a good purchase, because the bond was a "refunding bond, and, also, from their financial state-"ment. When I purchased it I made no inquiries in re-"gard to the outstanding indebtedness of the city of "Santa Cruz, to refund which this series of bonds was "issued, nor did I make any inquiry in regard to the "title of Coffin & Stanton, or any members of that firm, "to the bond, and had no knowledge in regard to their "title from any source other than inquires made by me. "I had no knowledge relative to the condition of the out-"standing indebtedness of the city of Santa Cruz further "than the published statement made by Coffin & Stanton "of the indebtedness, together with the assessed valua-"tion and population, etc.— the usual statement fur-"nished by bond houses. I was furnished by Coffin &

"Stanton with copies of an opinion of attorneys. The "Santa Cruz attorney's name was Goldsby. My recol- "lection is that they were both California attorneys. "The opinions were sent to me with the bond. I exam- "ined them practically at the same time I paid for the "bond. I felt that the house of Coffin & Stanton was a "reputable house, and I knew about Santa Cruz, and "that an obligation against them was good, so I bought "the bond in good faith, believing that it was good and "would be paid."

It further appears from the uncontradicted evidence that the Wakefield Trust Company, of Wakefield, Rhode Island, the owner of one of the bonds assigned to plaintiff herein for collection, had actual notice of facts tending to impeach the truth of the recitals in said bonds before coming into possession of it.

John Babcock, a witness who was sworn on behalf of plaintiff, testified: That he is the treasurer of said Wakefield Trust Company, and that said trust company had in its possession a $1,000 bond purporting to be executed by the officers of the city of Santa Cruz on the 16th day of April, 1894, which said bond was taken by said trust company from Coffin & Stanton as collateral security for a loan made to Coffin & Stanton by said trust company; that when said trust company made the loan to Coffin & Stanton they were furnished by Coffin & Stanton with a letter and circular relative to said refunding bond issue, which said letter and circular are in the words and figures following, to wit:

"Coffin & Stanton, Bankers. New York. London.

"72 Broadway, New York, Aug. 26, 1894.

"Wakefield Trust Company,

"Wakefield, Mass.—

"Gentlemen: We have disposed of the $2,000 Illinois "Central 4 per cent. bonds which were held by you as "part collateral to our loan, for immediate delivery, and "therefore send you to-night, under separate registered "cover, $1,000 city of Santa Cruz, Cal., 5 per cent. bond "and $1,000 New York City Suburban Water Company "6 per cent. bond. Please send the Illinois Central "bonds by return registered mail; we have insured them "during transit. We enclose postage for that purpose.

"You are doubtless familiar with the merits of the "New York City Suburban bonds, as you at present "hold a number of them as collateral to our loan. We "might add we have made quite a number of sales of "these bonds within the past two weeks, at prices rang- "ing from 100 to 102½ and interest.

"We would call your attention to the fact that the "city of Santa Cruz is a prosperous city located in the "most highly improved portion of the State of Califor- "nia, in the vicinity of San Francisco, being peopled "principally by inhabitants from New York and the New "England States, who have gone thither in search of a "more congenial climate. The city's affairs are well "and intelligently conducted, we having been its fiscal "agents for many years, and have never known it to de- "fault or delay in the payment of interest upon any of its

"bonds. This issue was purchased by us after a thor-
"ough investigation by our Mr. Stanton upon the
"ground and after he had become satisfied as to the sta-
"bility of the city and its future prospects. We conse-
"quently have no hesitation in recommending the bonds
"as an excellent investment.

"Trusting that this substitution will meet with your
"approval, we remain,

"Yours truly,

"COFFIN & STANTON,

"T."

"Coffin & Stanton, Bankers. New York. London.

"We offer, subject to sale or advance in price,

"$300,000

"City of Santa Cruz, California,

"Five per cent. refunding gold.

"Dated April 16, 1894. Due as follows:

"Nine thousand dollars April 15, 1895, and $9,000 an-
"nually thereafter. Average time to run, twenty and
"one-half years. No option of redemption before ma-
"turity. Denomination, $1,000. Coupons annually,
"April 15. Payable at city treasurer's office, Santa
"Cruz. Real valuation, $9,768,600. Assessed valua-
"tion, $3,907,400. Total debt (this issue), $360,000.
"Issued to refund bonds (for water supply), $320,000.
"Net debt, $40,000. Including the suburbs, a total popu-
"lation of 11,000 is tributary to the water system. The
"corporate limits of the city has not been enlarged for
"many years.

"The water plant is a gravity system, costing about
"$370,000.

"A legal investment for savings banks in the States
"of Rhode Island, Pennsylvania, Maryland, and New
"Hampshire. Price, 101 and interest. Nets nearly 5
"per cent.

"Under the law governing saving banks' investments
"in the State of Massachusetts, the debt issued for water
"supply is deducted from the gross debt on the theory
"that such property is self-sustaining, and no burden
"upon the city. In estimating the debt indebtedness
"this rule has been followed" (Rec., pp. 95-7).

And that said circular above set forth gives the assessed valuation of all the real and personal property in the city of Santa Cruz and the total debt of said city, and thus clearly shows that the adding of the refunding bond issue to the then outstanding indebtedness of the city of Santa Cruz would necessarily increase the indebtedness of said city, if said bonds were valid, to an amount in excess of 15 per cent. upon the said assessed valuation of the real and personal property of said city.

It further appears from the uncontradicted evidence that the First National Bank of Worcester, Massachusetts, the owner of twenty-two of said refunding bonds assigned to the plaintiff for collection, had actual notice of facts tending to impeach the truth of the recitals in said bonds before coming into possession of them. The plaintiff testified in his own behalf, and stated that he was the president of the First National Bank of Wor-

cester, Massachusetts, and that said bank had acquired possession of twenty-two bonds on account of a loan of $25,000, made at that time of Coffin & Stanton and represented by a promissory note of Coffin & Stanton, and that $12,000 Illinois Central 4's and $18,000 city of Santa Cruz 5's were pledged as collateral security for the payment of that note; and that he represented the bank in this transaction with Coffin & Stanton; that the bank made no investigation of the financial condition of the defendant prior to the making of this loan; but that Mr. Terrell, an agent of Coffin & Stanton, delivered to said plaintiff a circular (which was the same circular hereinbefore set forth), and that such circular gave all information that the First National Bank of Worcester had in regard to the financial condition of the city of Santa Cruz. It had no statement or opinion in respect to the validity of the issue. Mr. Terrell made satisfactory representations in regard to that (Rec., pp. 102-4).

It further appears from the uncontradicted evidence that the First National Bank of Hagerstown, Maryland, the holder of some of said refunding bonds assigned to plaintiff herein, had actual notice of facts tending to impeach the truth of the recitals in said bonds before coming into possession of them.

Frank W. Mish, an attorney for and director of said First National Bank of Hagerstown, Maryland, testified: That the said bank came into possession of bonds purporting to be executed by officers of the defendant on April 16, 1894; that said bonds were taken as security for

a loan made to Coffin & Stanton; and that said circular hereinabove set forth was furnished to said bank by said Coffin & Stanton before the transfer of said bonds to said bank (Rec., pp. 104-6).

It further appears from the uncontradicted evidence that the Albany City National Bank, the holder of twenty of said refunding bonds assigned to plaintiff herein, had actual notice of facts tending to impeach the truth of the recitals in said bonds before coming into possession of them (Rec., pp. 106-8).

Jonas H. Brooks, a witness on behalf of the plaintiff, testified: That he was cashier of the Albany City National Bank, at Albany, N. Y.; that the refunding bonds held by said bank were obtained from Coffin & Stanton in the nature of collateral security for a loan made them; and that the said circular (hereinabove set forth) was also furnished to said Albany City National Bank by said Coffin & Stanton before the consummation of the transaction (Rec., pp. 106-7).

It further appears from the uncontradicted evidence that the South Norwalk Savings Bank of South Norwalk, the holder of eleven of said bonds assigned to plaintiff herein, had actual notice of facts tending to impeach the truth of the recitals contained in said bonds before coming into possession of them.

John W. Ferriss, a witness on behalf of plaintiff, testified: That he is vice-president of the South Norwalk Savings Bank of South Norwalk; that the said eleven bonds purporting to be executed by officers of the defend-

ant, on the 16th of April, 1894, came into possession of the bank as collateral security for a loan made to Coffin & Stanton, of New York, by said bank; and that, before the transfer of said bonds from Coffin & Stanton to said bank, Coffin & Stanton had submitted to said bank the circular hereinabove set out (Rec., pp. 109-10).

It further appears from the uncontradicted evidence that the Bank of Skaneateales, of Skaneateales, New York, the holder of five of said bonds assigned to plaintiff herein, had actual notice of facts tending to impeach the truth of the recitals in said bonds before coming into possession of them.

Benjamin F. Petheram testified: That he is cashier of said Bank of Skaneateales, and that said bank made a loan to Coffin & Stanton on their note, and took the said five bonds as collateral security therefor; and that before coming into possession of said bonds the said Bank of Skaneateales was furnished by Coffin & Stanton with the circular set forth hereinabove (Rec., pp. 110-12).

It further appears from the uncontradicted evidence that the Kenduskeag National Bank of Bangor, Maine, the holder of twelve of the said bonds assigned to plaintiff herein, had actual notice of facts tending to impeach the truth of the recitals in said bonds before coming into possession of them.

Frederick W. Hill testified: That he is a director of said Kenduskeag National Bank, and that the said bonds were taken by said bank as collateral for a loan made to Coffin & Stanton by said bank, and that before

said bonds came into possession of said bank Coffin & Stanton furnished said bank with the circular hereinabove described, upon which the said bank relied (Rec., pp. 114-17).

It further appears from the uncontradicted evidence that the National Bank of Waterville, of Waterville, New York, the holder of one of said bonds assigned to plaintiff herein, had actual notice of facts tending to impeach the truth of the recitals in said bonds before coming into possession of it.

Samuel W. Goodwin testified: That he is the President of the National Bank of Waterville; that the said bank came into possession of one refunding bond of the city of Santa Cruz, given as collateral security to a note of Coffin & Stanton; that he (the said president) had made a thorough investigation of the bonds at that time, having sent to him from Coffin & Stanton copies of letters from G. Bowman, then mayor of Santa Cruz, and also being told by Mr. Stanton that they had bought the bonds, and that they were the actual owners thereof, and that they did not at that time handle any bond except such as they were the actual owners of; and also that the bank was furnished with the said circular set forth above before it took the bond; and, further, that the bank relied upon the prospectus and previous investigation of other Santa Cruz bonds and the statement of Coffin & Stanton and the letter of G. Bowman, mayor; that the knowledge that the bank

had concerning the value of the bond at the time it was taken by the bank, and the financial condition of the city of Santa Cruz, was derived from the prospectus sent to the bank by Coffin & Stanton, and the knowledge obtained in the previous investigations (Rec., pp. 117-20).

It further appears from the uncontradicted evidence that the First National Bank of Webster, Massachusetts, the holder of four of said bonds assigned to plaintiff herein, had actual notice of acts tending to impeach the truth of the recitals thereof before coming into possession of them.

Edward L. Spaulding testified: That he is the cashier of said First National Bank, and that said refunding bonds came into the possession of said bank as collateral, being security for a loan advanced Coffin & Stanton by the bank, and that the said printed statement or circular above set forth was furnished said bank before it took the bonds (Rec., pp. 120-23).

And for the further reason that the bonds upon their face and by their recitals gave notice of and put all purchasers upon inquiry as to the fact that the indebtedness created by the refunding bond issue, added to the pre-existing indebtedness of the city of Santa Cruz, exceeded the limit of 15 per cent., beyond which limit said city of Santa Cruz could not lawfully incur indebtedness; and the recitals in said bonds refer to the vote at the special election, which was a matter of pub-

lic record and notoriety, and which showed the said excess over 15 per cent.

(Error Assigned, Rec., pp. 279 to 285.)

XIV.

That the court erred in making and finding that portion of Finding of Fact No. 12 of the original findings of fact filed herein, which said portion of said findings of fact is set forth and referred to in the specification of error last hereinabove set forth, for the following reasons, to wit:

That the refunding act of 1893, under which the bonds herein questioned were issued, is in conflict with the constitution of the State of California in that said act is a local and special law relating to a subject concerning which the constitution of the State of California required all laws to be general; that said bond issue was illegally made because in excess of the bonded indebtedness which the city of Santa Cruz could contract under the laws of the State of California in force at the time when said bonds were issued; that said refunding act, under which said bonds are alleged to have been issued, did not authorize the issuance of any bonds by the city of Santa Cruz, for the reason that, while the act in question gives the power to the governing body of any city within the classes selected to submit to the qualified electors thereof, at an election to be held for that purpose, the question of refunding its out-

standing indebtedness, evidenced by bonds and warrants thereof, and specifies the manner in which said election shall be called and held, and the form of notice to be given of such election, there is no provision in the act, or in any other act or law of the State of California, as to what shall be the result of a vote favorable to refunding at such election, and that said refunding act does not say, either in terms or in substance, that if the vote at such election be favorable to refunding, the city, or its governing body, or its executive head, or any other officer or agent, shall have power to make or issue refunding bonds; that said refunding act is unconstitutional in that it is in violation of the provisions of the constitution of the United States, which forbids any State to pass any law impairing the obligation of a contract; that said bonds sued upon herein are payable only in gold coin of the United States, in violation of the provisions of said refunding act of 1893, under which said bonds were issued, which requires that bonds issued under the terms and authority thereof shall be payable in gold coin of lawful money of the United States; that it appears from the uncontradicted evidence herein that said refunding bonds sued upon herein were not sold by the city of Santa Cruz for their face value in gold coin, as required by said refunding act of 1893, and that said city of Santa Cruz received no consideration whatever for said bonds (Rec., p. 218); that it appears from the uncontradicted evidence herein that no notice of an election submitting to the elec-

tors of said city of Santa Cruz the question of refunding the bonded indebtedness thereof was ever given or published as required by law or at all (Rec., pp. 19, 20, 32, 39, 60, 90); and that it appears from the uncontradicted evidence herein that no election was ever held or had in said city of Santa Cruz at which two-thirds of the electors of said city, voting at such election, voted in favor of issuing bonds for the purpose of refunding the outstanding indebtedness of said city, as required by the constitution of the State of California, in this, to wit: that at the purported election held in said city of Santa Cruz, at which electors of said city voted on the proposition of refunding the outstanding indebtedness thereof, less than one-half of the qualified electors of said city voted, and the polls at such purported election were closed one hour and fifteen minutes before the time provided by law for their closing, and that such purported election was held and conducted without notice thereof given and published in the manner required by law or at all (Rec., p. 32); that it appears from the uncontradicted evidence that the refunding bonds sued upon herein were not executed or issued by the city of Santa Cruz, and were not signed by the mayor of the said city of Santa Cruz, but that the greater portion thereof (it being impossible to identify which portion of which bonds) were signed by one William T. Jeter on the afternoon of the 16th day of April, 1894, after the election and qualification of the successor of said William T. Jeter as mayor

of the city of Santa Cruz, and after the term of said William T. Jeter as mayor of said city had expired, and while said William T. Jeter was neither *de jure* nor *de facto* mayor of said municipality, the city of Santa Cruz (Rec., pp. 22, 146, 150); and that it appears from the uncontradicted evidence herein that said refunding bonds, so sued upon, were issued in part for the refunding of the mortgage bonds of a private corporation, namely, the City Water Company of Santa Cruz, in violation of the provisions of the refunding act of 1893, under which said refunding bonds are alleged to have been issued, and in violation of the constitution of the State of California.

(Error Assigned, Rec., pp. 285-6).

XV.

That the court erred in making and finding that portion of Finding of Fact No. 12 of the original findings of fact filed herein, which is in the words and figures following, to wit:

"Therefore, knowledge of F. H. Prince & Co. concern-
" ing the illegality of said bonds, as shown by ordi-
" nances numbered 314, 315 and 320, was not construct-
" ive notice thereof to E. G. & E. Wallace."

The court erred in making and finding said portion of said finding, because said finding is not supported by the evidence, nor by any evidence in the case, and is contrary to all of the evidence upon that subject in the

case, and because the evidence shows that F. H. Prince & Co. were, in the matter of purchasing the bonds in question, and in the whole of said transaction, the agents for all purposes of said E. G. & E. Wallace (Rec., pp. 91, 102, 235-8, 242-5).

(Error Assigned, Rec., pp. 286-7.)

XVI.

That the court erred in making and finding that portion of Finding of Fact No. 12 of the original findings of fact filed herein, which is in the words and figures following, to wit:

"Nor did E. G. & E. Wallace have any actual knowl-"edge or actual notice of said matters, nor of any fact "tending to impeach the truth of the recitals contained "in the bonds."

The court erred in making said portion of said Finding of Fact No. 12 of the original findings of fact filed herein that it appears from the evidence (Rec., pp. 235-245, 246-7) that said E. G. & E. Wallace had notice of the ordinances Nos. 314 and 315 set forth in the additional findings of fact filed herein (Rec., pp. 26 to 41), by express reference to said ordinances in the recitals contained in each of said bonds, and had knowledge from such ordinances that the refunding bonds in question were issued in part for the purpose of refunding the mortgage bonds of a private corporation, namely, the

City Water Company of the city of Santa Cruz; and had knowledge that the remaining alleged indebtedness of the city of Santa Cruz to be refunded, a large part, and nearly the whole thereof, other than said private mortgage bonds, was no indebtedness of said city at all, and the 450 purported bonds by which the same are evidenced were void, as having been nearly all issued in violation of and without authority of law after the repeal of the statute under which an attempt was made to issue them, as set forth in Assignment No. 28; and had notice from said ordinances that the election required by law and by the Constitution of California to be held upon the question of incurring indebtedness and issuing refunding bonds was not conducted in accordance with the laws of the State of California relating to such election in the city of Santa Cruz, in this: that at said election the polls were to be opened at sunrise and closed at 5 o'clock in the afternoon of the day of election—one hour and fifteen minutes before the time provided by law for closing the polls at such election; and that the question of refunding the mortgage bonds of said private water company was so united with the proposition to refund the indebtedness of said city of Santa Cruz, evidenced by the bonds and warrants thereof, that the electors of said city of Santa Cruz could not vote for the refunding of said indebtedness, evidenced by the bonds and warrants thereof, and against the refunding of said bonded indebtedness of said private corporation; and that the notice required by law to be published and given of such election was not

published or given, and that no notice of such election was published or given. And it appears from the uncontradicted evidence that said E. G.& E. Wallace had notice through said ordinances and through the assessment roll of said city of Santa Cruz, and through the vote at said alleged election, that said refunding bond issue constituted an increase of the bonded indebtedness of said city of Santa Cruz to an amount in excess of 15 per cent. upon the assessed value of all taxable real and personal property in said city, and therefore constituted an over-issue of bonds, contrary to the limitations imposed upon the contraction of indebtedness and the issuance of bonds on the part of said city of Santa Cruz by the laws of the State of California.

(Error Assigned, Rec., pp. 287-8.)

XVII.

That the Court erred in failing to make any finding of fact on the issue joined by the defendant's answer that 450 of the bonds of the city of Santa Cruz of the denomination of $500.00 each, to refund which, in part, the said purported election was held, and the refunding bonds sued upon herein were, and each of them was, invalid and void, for the reason that all and each of said bonds were and was executed, sold and delivered after the act of the Legislature of the State of California authorizing their execution, sale and delivery

had been repealed, namely, after the 19th day of March, 1889 (Rec., pp. 12, 13, Nos. II and III).

(Error Assigned, Rec., p. 288.)

XVIII.

That the court erred in overruling the defendant's objection to the question asked the witness O. J. Lincoln, upon the grounds that the same was irrelevant, immaterial and incompetent. Said question and the answer thereto are as follows:

"Q. Mr. Lincoln, who performed the duties of the "office of mayor of the city of Santa Cruz between "April 16, 1894, and May 7, 1894? A. Mr. Jeter."

It has been established by the testimony of Robert Effey and by documentary evidence (Rec., p. 146), that the said Robert Effey, on the 16th day of April, 1894, was the duly elected and qualified mayor of the city of Santa Cruz for the term of two years following April 16, 1894. The said question asked the witness Lincoln was for the purpose of proving that some one else, and not Mr. Effey, was mayor of the city of Santa Cruz between April 16, 1894, and May 7, 1894; and said question was immaterial, irrelevant and incompetent, and the admission of the answer thereto prejudicial to the defendant.

(Error Assigned, Rec., p. 262.)

XIX.

That the court erred in overruling the objection of defendant to a question asked the witness William T. Jeter, on the grounds that the same is immaterial, irrelevant and incompetent. Said question and the answer thereto are as follows:

"Q. Mr. Jeter, who performed the duties of the office "of mayor of Santa Cruz from April 16 to May 7, 1894?

"A. I acted as mayor until the evening of the 7th of "May, as near as I can recollect" (Rec., p. 149).

It had been established by the testimony of Robert Effey, and by documentary evidence as hereinabove in these assignments of error stated, that on the 16th day of April, 1894, Robert Effey was the duly elected and qualified mayor of the city of Santa Cruz for the then ensuing term of two years; and the said question asked the witness Jeter was for the purpose of showing that he (Jeter) was mayor of the city of Santa Cruz from April 16th to May 7th, 1894, and said question was immaterial, irrelevant and incompetent, and the admission of the answer thereto prejudicial to the defendant.

(Error Assigned, Rec., p. 263.)

XX.

That the court erred in failing to make any finding of fact on the issue joined by the defendant's answer that at the time of the execution, issuance, sale and delivery

of said 225 bonds of the city of Santa Cruz, the sum thereof, namely, $225,000.00, was in excess of the amount of the indebtedness which the city of Santa Cruz might lawfully incur at the time of the execution, issuance, sale and delivery thereof for the purpose for which said bonds were issued, namely, for public improvements (Rec., pp. 13, 26, 217, 219).

(Error Assigned, Rec., p. 288.)

XXI.

That the court erred in failing to make any finding of fact on the issue joined by the defendant's answer that the eighty-nine so-called first mortgage bonds of the private corporation, of the City Water Company of Santa Cruz, of the denomination of $1,000.00 each, were, and each of them was, without right and without authority, issued by a private corporation known as the City Water Company of Santa Cruz upon a pretended mortgage, executed without right or authority by said private corporation, upon municipal property of the city of Santa Cruz, and that no part of the sum of said so-called first mortgage bonds, nor of said mortgage, is or ever was a part of the municipal indebtedness of the city of Santa Cruz, and no part thereof was ever evidenced by bonds and warrants of the city of Santa Cruz (Rec., p. 13.)

(Error Assigned, Rec., p. 288.)

XXII.

That the court erred in failing to make any finding of fact on the issue joined by defendant's answer that no election was, on the 13th of March, 1894, or at any other time at all, held or conducted in the city of Santa Cruz on the question of refunding the outstanding indebtedness or any indebtedness of said city (Rec., pp. 14, 15, No. X).

(Error Assigned, Rec., p. 289.)

XXIII.

That the court erred in failing to make any finding of fact on the issue joined by the defendant's answer that the alleged refunding bonds or obligations of the city of Santa Cruz, described in the plaintiff's amended complaint, together with the alleged coupons thereto attached, including the nine alleged bonds and the 282 alleged coupons sued upon by plaintiff herein, were, and each of them was, on the 23d day of April, A. D. 1894, by one Walter Stanton, willfully, unlawfully and feloniously taken, stolen and carried away from the possession of the city clerk of said city of Santa Cruz (Rec., p. 15, No. 1).

(Error Assigned, Rec., p. 289.)

XXIV.

That the court erred in failing to make any finding of

fact on the issue joined by the defendant's answer that the pretended issue of 360 of the so-called refunding bonds of the par value of $1,000.00 each on the 16th day of April, 1894, as set forth in the plaintiff's amended complaint, was an unlawful attempt without authority on the part of the mayor and common council of the city of Santa Cruz to increase the bonded indebtedness of said city beyond the limit of 15 per cent. upon the assessed value of all taxable real and personal property of said city, as prescribed and fixed by the laws of the State of California (Rec., p. 16, No. IV).

(Error Assigned, Rec., p. 289.)

XXV.

That the court erred in failing to make any finding of fact on the issue joined by the defendant's answer that said pretended issue of 360 so-called refunding bonds of the par value of $1,000.00 each on the 16th day of April, 1894, as set forth in plaintiff's amended complaint, and every part and portion of said pretended bond issue, and each and every pretended bond thereof, is, and at all times has been, an attempted over-issue of municipal bonds of the city of Santa Cruz (Rec., p. 16, No. V).

(Error Assigned, Rec., p. 289.)

That the court erred in failing to make any finding of fact on the issue joined by the defendant's answer that said so-called refunding bonds sued upon herein and the

coupons thereto, and each and all of them, were and was fraudulently taken by one Walter Stanton from the custody of the city clerk of the city of Santa Cruz on or about the 24th day of April, 1894, and then and there by him, the said Walter Stanton, appropriated to his own use (Rec., p. 17, No. II).

(Error Assigned, Rec., p. 289.)

XXVII.

That the court erred in making and finding that portion of the first conclusion of law found by said court, which reads as follows: "That William T. Jeter was *de* "*facto* mayor of the defendant city of Santa Cruz on the "16th day of April, 1894, and so continued until May 7, "1894" (Rec., p. 25), for the following reasons:

That said portion of said conclusion of law is not supported by any of the findings of fact herein.

That it appears from the ninth finding of fact herein (Rec., p. 22) that William T. Jeter was duly elected mayor of the city of Santa Cruz on May 11, 1892, and that his successor, Robert Effey, was duly elected mayor of said city on the ninth day of April, 1894, and duly qualified as such mayor between the hours of 11 o'clock a. m., and 2 o'clock p. m., of April 16, 1894; that upon the qualification of Robert Effey as mayor of Santa Cruz he became the *de jure* mayor of said city of Santa Cruz; that thereafter, on said 16th day of April, 1894, the said William T. Jeter performed no function, and exercised

no act, either publicly or notoriously, which gave notice to, or caused the people of the city of Santa Cruz to believe or to know that he was acting as, or intended to act as, or was exercising the functions of, or intended to exercise the functions of the office of mayor of the city of Santa Cruz.

That it appears from Finding of Fact No. 13 (Rec., p. 24) that some of the bonds sued upon herein were signed by William T. Jeter on April 16, 1894, after the qualification of his successor in the office of mayor; and it does not appear from the finding of fact, or any finding of fact herein, that at the time of signing said bonds said William T. Jeter was either publicly or openly or notoriously exercising the functions, or attempting to exercise the functions of mayor of said city of Santa Cruz; and that it does not follow from the facts found that Jeter was at any time after the qualification of his successor the *de facto* mayor of said city, and no facts are found showing that he was such *de facto* mayor during such time.

(Error Assigned, Rec., p. 290.)

XXVIII.

That the court erred in making and finding that portion of the first conclusion of law found by said Court which reads as follows: "And that he, and the persons "who assumed to act as members of the common council "of defendant, on the 16th and 23rd days of April, 1894,

"to wit: J. F. Hoffman, E. G. Greene and F. W. Lucas, "were on those days the *de facto* mayor and the *de facto* "members of the common council of the defendant city" (Rec., p. 25), for the following reasons, to wit:

That said portion of said conclusion of law is not supported by any finding of fact herein, in that it appears from the findings of fact herein (Rec., p. 22) that on the 9th day of April, 1894, Robert Effey was duly elected as mayor of said defendant city, to succeed William T. Jeter, and duly qualified as such between the hours of 11 o'clock a. m. and 2 o'clock p. m. of April 16, 1894, and Messrs. Henry G. Insel, John Howard Bailey, J. D. Maher, and Frank K. Roberts were, on the said 9th day of April, 1894, duly elected members of the common council of said defendant city, and all of them duly qualified as such councilmen before the meeting of the common council of said defendant, held April 16, 1894; and that it does not follow from the facts found that said Jeter was, at any time after the qualification of his successor on the 16th day of April, 1894, the *de facto* mayor of said city of Santa Cruz, or that said Hoffman, Greene, and Lucas were, at any time after the qualification of their successors as members of the common council of said city of Santa Cruz, *de facto* members of said common council; and no facts were found showing that said Jeter was *de facto* mayor, or that said Hoffman, Greene, and Lucas were *de facto* members of the common council during such time.

(Error Assigned, Rec., p. 290-1.)

XXIX.

That the court erred in making and finding that portion of Conclusion of Law No. 1 herein which reads as follows:

"And that the bonds and coupons sued on are upon " their face valid obligations of the defendant" (Rec., p. 25), for the following reasons, to wit:

That said portion of said conclusion of law is not supported by the findings of fact herein, or by any finding of fact herein.

That the act of the legislature of the State of California entitled, "An Act to amend an Act entitled, 'An Act " 'authorizing the common council, board of trustees, or " 'other governing body of any incorporated city or town, " 'other than cities of the first class, to refund its indebt- " 'edness, issue bonds therefor, and to provide for the " 'payment of the same (approved March 15, 1883)' (ap- " proved March 1, 1893)," by authority of which, and under the terms of which, it is alleged that the bonds sued on were issued, is in conflict with the Constitution of the State of California in that said act is a local and special law relating to a subject concerning which the Constitution of the State of California requires all laws to be general.

That said bonds and coupons were and are invalid because in excess of the amount of bonded indebtedness which the city of Santa Cruz could contract under the

laws of the State of California in force at the time when said bonds were issued.

That the said act of the legislature of the said State of California above referred to and entitled, did not authorize the issuance of any bonds by the city of Santa Cruz, for the reason that, while the act in question gives power to the governing body of any city within the classes limited, to submit to the qualified electors thereof, at an election to be held for that purpose, the question of refunding its outstanding indebtedness evidenced by bonds and warrants thereof, and specifies the manner in which elections shall be called and held and the form of notice to be given of such election, there is no provision in the act, nor in any other act or law of the State of California, as to what shall be the result of a vote favorable to refunding at such an election, and that said refanding act does not say, either in terms or in substance, that if the vote at such election be favorable to refunding the city or its governing body, or its executive head, or any other officer or agent, shall have power to make or issue refunding bonds.

That said refunding act under which said bonds are alleged to have been issued is unconstitutional in that it is in violation of the provision of the Constitution of the United States, which forbids any State to pass any law impairing the obligations of a contract.

That said bonds show upon their face that they are invalid for the reason that they are payable in gold coin of the United States (Rec., p. 4), in violation of the pro-

vision of said refunding act of 1893, under which said bonds were issued, which requires that said bonds issued under the terms and authority thereof shall be payable in gold coin or lawful money of the United States.

That it appears from the findings of fact herein that a large portion of said bonds, which portion it is impossible to identify, were not executed by the city of Santa Cruz, nor signed nor executed by any officer thereof, but were, on the 16th day of April, 1894, after the qualification of his successor, signed by one William T. Jeter, pretending to act as mayor of said city of Santa Cruz, after his term of office had expired, and while he was no longer either a *de jure* or a *de facto* officer of said municipality (Rec., p. 22, No. 9).

That it appears in the findings of fact herein that the plaintiff did not pay any money consideration for said bonds, but that they were assigned to him without consideration and for collection only (Rec., p. 18, No. 2).

That it appears from the findings of fact herein that said bonds constituted *an* over-issue of indebtedness of the city of Santa Cruz, in violation of the laws of the State of California (Rec., p. 19, No. 5).

That it appears in the findings of fact herein that said bonds were issued in part for the purpose of refunding the mortgage bonds of a private corporation, to wit: the City Water Company of Santa Cruz, which said bonds were neither bonds nor warrants of said defendant the city of Santa Cruz, and were not evidences of the indebt-

edness of the city of Santa Cruz (Rec., p. 19, No. 5, pp. 26-8).

That it appears in the findings of fact herein that ordinance No. 315 of said defendant city, dated February 26, 1894 (Rec., pp.19-20, No. 6, pp. 33-9), provided for and required notice to be given of an election to be held for the purpose of submitting to the qualified electors of said city of Santa Cruz the question of refunding the outstanding indebtedness thereof, which said ordinance directed the city clerk to cause to be published in the "Santa Cruz Surf" and "Santa Cruz Sentinel," for not less than ten days before the thirteenth day of March, 1894, a notice of such special election, and to post said notice at each place of election in said city, and which ordinance further provided that the notice so to be published and posted should be substantially in the words and figures set out in said ordinance, and should contain, among other things, a recital of the indebtedness to be refunded, together with the denomination, character, time of payment, rate of interest, as well as all other details of the bonds proposed to be issued, and that the polls at such election would be opened at sunrise in the morning of said day of election, and should close at 5 o'clock p. m. of the same day.

And it further appears from said findings of fact that such notice of election, so provided for and required to be given and published, was not, in fact, either given, made, or published as required by said ordinance or by the laws of the State of California, or at all, and that no

notice of such election was ever given or published (Rec., p. 20, No. 7).

That it further appears from said findings of fact that said Ordinance No. 315 of said city of Santa Cruz, being the only ordinance providing for notice to be given of such election, required that the polls at such election should be opened at sunrise in the morning of said day, and should close at 5 o'clock p. m. of said day, in violation of the laws of the State of California then in force which required that the polls at such election should not be closed until sundown of the day thereof (Rec., pp. 19, 38), and that it appears from said findings of fact that the polls at such alleged election were opened and closed at the hours named in said ordinance (Rec., p. 19, No. 6), in conflict with and contrary to the provisions of the laws of the State of California with reference to the opening and closing of polls at such an election.

That it appears from said findings of fact that Ordinance No. 314 of said defendant city of Santa Cruz, calling an election for the purpose of submitting to the qualified electors of said defendant city the question of issuing bonds to refund the outstanding indebtedness thereof, and Ordinance No. 315, providing the form of notice to be given of such election and requiring the clerk of said city to publish the notice aforesaid, each showed upon its face that the alleged indebtedness to be refunded consisted in part of 89 bonds of the private corporation, the City Water Company of Santa Cruz, which said bonds were of the value of $89,000.00, and which said

bonds were neither valid nor existing indebtedness of the city of Santa Cruz, nor did they constitute or evidence any indebtedness of the city of Santa Cruz represented by bonds or warrants thereof (Rec., pp., 19, 26, 34), and that it was impossible for the electors of said city of Santa Cruz, or any elector of said city, at such election, so-called, to vote in favor of refunding the indebtedness of the city of Santa Cruz, evidenced by bonds or warrants thereof, and against the refunding of indebtedness evidenced by the bonds of said private corporation, the City Water Company of Santa Cruz (Rec., pp. 26-7, 30-1, 34, 37-8).

That it appears from the findings of fact that no election was ever held in the city of Santa Cruz, nor by the electors thereof, for the purpose of determining the question of the refunding of the outstanding indebtedness of the city of Santa Cruz evidenced by bonds or warrants thereof (Rec., pp. 19, 20, Nos. 6 and 7).

That it appears from said findings of fact that no election was ever held in the city of Santa Cruz, nor by the electors thereof, for the purpose of determining the question of refunding any indebtedness whatever (Rec., pp. 19-20).

That it appears from said findings of fact that said bonds were never issued by the defendant, the city of Santa Cruz, but that, on the 16th day of April, 1894, one William T. Jeter, pretending to act as mayor of said city, and J. Howard Bailey, F. J. Hoffman, E. G. Greene, and F. W. Lucas, pretending to act as the common council of

said city, in violation of law, and without bids therefor having been received for the purchase of said bonds, and without authority of law, accepted a certain proposition of Coffin & Stanton to take said bonds, and all thereof, which proposition is dated February 27, 1894, and is set forth in Finding of Fact of No. 10 herein (Rec., p. 22, No. 9; pp. 22-3, No. 10).

That said proposition was illegal, and that said persons so pretending to act as mayor and common council of said city of Santa Cruz had no authority or right to accept said proposition.

That it further appears from said findings of fact that the said William T. Jeter, pretending to act as mayor of said city, and the said Lucas, Bailey, Hoffman, and Greene, pretending to act as members of the common council thereof (Rec., p. 22), without authority of law, and without any right or authority whatever in the premises, and in direct violation of the laws of the State of California, and particularly in violation of the provisions of the refunding act of 1893, under which it is alleged said bonds were issued, directed the clerk of said defendant city to deliver said refunding bonds, and all thereof, to Coffin & Stanton, without consideration, and without any value whatever of any kind being received therefor; and that said bonds were, in accordance with such direction delivered to Coffin & Stanton on April 24, 1894 (Rec., p. 23, No. 11).

That it further appears from said findings of fact that said proposition of Coffin & Stanton above referred to

and set forth in Finding No. 10 herein (Rec., pp. 22-3), was never in fact carried out by said Coffin & Stanton, or by any one, and that the city of Santa Cruz received no consideration whatever for said bonds, or for any of them (Rec., p. 24, No. 15).

That it appears affirmatively from said findings of fact that, except as against bona fide purchasers without notice, for a valuable consideration, said bonds were invalid and did not constitute valid or other obligations of the defendant (Rec., pp. 18-19, No. 3; p. 25); that the only allegation of the complaint herein in regard to the character of the plaintiffs as bona fide holders without notice was, that said bonds were delivered to one Walter Stanton, for value received, and that said Stanton, afterwards and before the maturity thereof, sold and delivered to the plaintiff herein certain of said bonds and certain coupons (Rec., p. 6).

That there is no evidence or finding to sustain said allegations of said complaint, but that both the findings and the evidence show that the same were untrue and that said bonds were not delivered, nor were any of them delivered, to said Stanton, nor was any value received therefor, and that said Stanton did not sell or deliver any of said bonds or coupons to the plaintiff (Rec., p. 18, No. 2; p. 24).

That the only authority for the issuance or delivery of said bonds is that contained in the statutes of California; and that by the provisions of said statutes the condition precedent to the exercise of such authority was the

existence of an outstanding indebtedness evidenced by bonds and warrants of the city or town, and that, when such valid indebtedness so evidenced did actually exist, said authority could only be exercised in strict pursuance of the provisions of said statutes, especially the statute of March 1, 1893, including an election to be held for the purpose of refunding such indebtedness, and such indebtedness only, and that, in such case, it was necessary, under the statute, that the notice of such election should recite such indebtedness and show the same to be a valid indebtedness of said city or town to the extent of which indebtedness only could refunding bonds be issued.

That the questions of the existence of such indebtedness and of the sufficiency of such notice of election and the recitals thereof were strictly jurisdictional and went to the foundation and essence of the power of the common council, board of trustees, or other governing body, to proceed under such statute, and such questions were not left to the determination of such common council, board of trustees, or other governing body thereof, and that they could not give themselves jurisdiction by any determination or recital of that nature; and that, according to said statute, said refunding bonds could only be issued and disposed of in the manner specified in said statute, to wit: by being sold in the manner provided by such city council, or the governing body, to the highest bidder, for not less than their face value, and that, in such event, the proceedings of such sale must be placed in

the treasury to the credit of the refunding fund, and applied only for the purpose of refunding the indebtedness for which they had been issued, and that under said statute, such proceedings, after the issuance of said bonds, to wit: the selling thereof and the placing of the proceeds, were also jurisdictional, and the fact that they had been had in accordance with law was not committed by the law to the determination of the decision of said officials of said city or town, and could not be concluded thereby; and that it appeared on the face of said bonds that they were issued for the purpose of refunding the bonded indebtedness of said city of Santa Cruz, issuing bonds therefor, and providing for the payment of the same, under the said statute approved March 1, 1893, and in pursuance of the ordinances of the city of Santa Cruz, and of a vote of the electors of said city of Santa Cruz voting at an election called and held under said statute, and that, therefore, every purchaser of said bonds was affected with notice of said statute and all its conditions, requirements, and limitations, and had notice of said ordinances and said notice of election, and that said statute had not been complied with, and that the debt sought to be refunded was not such an indebtedness as could be refunded under said statute, and that said election was not held according to law, nor called according to law, and was put upon inquiry as to all the actual facts concerning the attempt to refund said indebtedness and make and issue said bonds; and that such inquiry, being pur-

sued with ordinary diligence, would necessarily have resulted in the ascertaining from record evidence and authentic documents and official documents of the facts showing the entire invalidity of said bonds, and all such puchasers were bound to know the terms of said statutes; and that there was no authority conferred by said statutes, or by any law of California upon said municipality to issue negotiable bonds, or bonds negotiable in the sense of precluding an inquiry between the municipality and such purchasers into the actual facts concerning the validity of said bonds.

(Error Assigned, Rec., pp. 291-6.)

XXX.

That the court erred in making and finding Conclusion of Law No. 2 herein, to wit: "That E. G. & E. Wallace "were bona fide purchasers of the bonds and coupons as- "signed by them to plaintiff without notice of the facts "recited in the ordinances of the defendant numbered "314, 315 and 320, and without notice of any fact tend- "ing to impeach the truth of the recitals contained in "said bonds" (Rec., p. 25), for the following reasons, to wit:

That said conclusion of law is not supported by the findings of fact herein, nor by any finding of fact herein.

That, for the reasons, and each thereof, assigned and given in Specification of Error No. XXIX, said E. G. &

E. Wallace had full notice of all the facts tending to impeach the truth of the recitals contained in said bonds, and for the further reasons:

That, in addition to the recitals on said bonds, the said E. G. & E. Wallace did not rely solely upon said recitals, and did not purchase said bonds on the face of any representations, assertions, or acts of the said city of Santa Cruz, but did in fact institute, and cause to be instituted by their agents and attorneys, an inquiry going back of and beyond the face of the bonds into their sufficiency and the regularity of the proceedings leading up to their issue, and particularly, in that respect, procured and obtained, before purchasing said bonds, the opinions of Z. N. Goldsby, Lafayette B. Gleason, and F. M. Dickinson, Jr., attorneys mentioned in the findings herein (Rec., pp. 39, 41-1), from the face of which opinions said E. G. & E. Wallace were further informed that said attorneys had had and examined and considered all the documentary and other evidence bearing upon the validity of said bonds, and had been fully informed of all the facts showing the invalidity thereof, and had had full notice of the fact that said ordinance submitted a proposition to refund indebtedness which could not be refunded under the statute, and that the notice of election also showed that the indebtedness so refunded was such as the city had no power to refund under the statute, and that the election was not called or had according to law and the statute (Rec., pp. 26 to 32 and 33 to 39), and that the bonds were not sold or disposed of as required by law

(Rec., pp. 22-3); and, having so sought and obtained such information, and relying upon the opinions of said attorneys and the result of their investigations, said E. G. & E. Wallace could not claim to be bona fide purchasers, or to be entitled to any estoppel against the city arising on the face of the bonds, but, having made such investigation and inquiry, and having acted upon said opinions and reports of their agents and attorneys as aforesaid, they were bound by the result, and all of the results, of such an investigation, and cannot escape the imputation of any knowledge resulting from a diligent and full investigation of the sources of inquiry open to them and to all the world on the face of authentic and recorded and official documents; and for the further reason that said E. G. & E. Wallace, as appears by the findings herein, were affected with actual notice of all the facts showing the invalidty of said bonds by reason of such actual notice on the part of F. H. Prince & Company, their agents in the transaction.

(Error Assigned, Rec., pp. 296-7.)

XXXI.

That the court erred in making and finding the general conclusion of law that the plaintiff is entitled to recover as against the defendant on all the bonds and coupons assigned to him, excepting the three coupons assigned to him by the Northern Counties Investment Trust Company, Limited, a judgment in the sum of $22,-

950.00 and interest thereon from April 15, 1895, and costs of suit (Rec., p. 25), for the reasons specified in Assignments of Error Nos. 47, 48, 49 and 50, on pages 290 to 296, both inclusive, of the record herein.

(Error Assigned, Rec., p. 297.)

XXXII.

That the court erred in rendering the judgment herein against the defendant upon its findings of fact herein in that the facts found by the court do not sustain the judgment rendered by the court, and that upon said findings, either a judgment should be rendered for the defendant, or a *venire de novo* should be ordered for insufficiency of the findings; and defendant specifies that it appears from said findings that the refunding bonds issued by the defendant, and of certain of which bonds and coupons attached thereto the plaintiff claims to be the owner and holder, were issued without authority of law and in disregard of the provisions of the statute under which they purport to have been issued, and were not valid obligation of the defendant in that it appears from said findings that the indebtedness to refund which said bonds were issued was not a valid indebtedness of the city of Santa Cruz evidenced by its bonds or warrants, but that the proposition submitted to the voters was as specified in the notice of election and in the ordinance of the city recited in the bonds, a proposition to refund not only certain bonds purporting to be the bonds of the city of

Santa Cruz, but also certain other bonds, to the amount of $89,000.00, which were the bonds of a private corporation and not of the city of Santa Cruz (Rec., pp. 19-20, 26-7), and that, of the remainder of said indebtedness proposed to be refunded, all but $39,000.00 thereof was not a valid indebtedness of the city of Santa Cruz, but consisted of bonds illegally issued by said city for improvement purposes, and issued after the repeal of the only law authorizing the issuance thereof, and that there is no finding of fact that E. G. & E. Wallace were bona fide purchasers of the bonds and coupons assigned by them to plaintiff without notice, and that the findings of fact show that none of the assignors of plaintiff were such bona fide purchasers without notice, because the findings show that the recitals in said bonds and the face thereof (Rec., pp. 20, 21), taken in connection with the statute of which all purchasers were affected with notice, showed the invalidity of said refunding issue, and that the same were not issued in pursuance of the statute of 1893, or to refund an indebtedness of the city of Santa Cruz, evidenced by bonds or warrants thereof, and showed that the provisions of the statute had not been followed and complied with; and the notice of election and ordinance recited in said bonds also showed that said bonds were issued in part for an indebtedness not that of the city of Santa Cruz or evidenced by its warrants or bonds, and that the election had not been properly held in pursuance of the statute.

And said findings of fact show that said issue of $360,-

000.00 worth of bonds for refunding purposes was an over issue, and beyond the authority and power of the city officials to make (Rec., p. 19), in that the same, when issued, constituted an indebtedness greater than 15 per cent. of the assessed valuation of the real and personal property of said city; and said findings of fact show that said bonds were not sold, as required by the statute, to the highest bidder, or for not less than their face value, in the character of money in which they were payable; and said findings show that said bonds were not executed or issued by legal or proper officials of said city, in that the greater portion thereof were signed by one William T. Jeter after his term of office as mayor of said city had expired, and at a time when he was neither *de facto* nor *de jure* mayor of said municipality.

And the said findings of fact further show that said refunding bond issue was never issued by said defendant the city of Santa Cruz, but that the same was, by certain individuals pretending to act as members of the common council of said city, but who had no right or authority so to act, and who were, at the time, neither *de facto* nor *de jure* members of the common council of said city, unlawfully ordered to be delivered by the city clerk of said city to Coffin & Stanton under the terms of an illegal contract theretofore accepted by said individuals pretending to act as such common council without authority, as aforesaid.

And that said findings further show that the city was

not and could not be estopped from setting up, as against any purchasers of said bonds, the illegality and invalidity thereof, and that all the purchasers thereof were not purchasers in good faith and for value and without notice, but were affected with notice of the invalidity of said bonds, in that the authorities of said city had no jurisdiction, power or authority to submit any proposition to the voters of said city for the refunding of anything but a legal indebtedness of said city, and had no authority to issue said refunding bonds except for such legal indebtedness, and that such want of authority could not be concluded by any recitals in the bonds, and that all purchasers thereof, by the recitals in the bonds, were referred to the notice of election and to the ordinance recited in said bonds, and which were, and were required by law to be, matters of record in writing, and could easily have been ascertained upon the minutes and recorded proceedings of the city officials; and that the question whether such refunding bonds were issued to refund a valid indebtedness of the city was one not committed by law to the decision and determination of the city officials, but was a fact and condition precedent to the exercise of their power in the premises, and was a fact ascertainable by an inspection of said notice of election and of said ordinance, and of which all intending purchasers of said bonds were required to take notice at their peril.

That there is no finding of fact that said purchasers took said bonds in reliance of any of the recitals thereof or any representations made by the city officials, and, so

far as E. G. & E. Wallace are concerned, the findings show that they did not so rely, but instituted an independent investigation of their own and employed attorneys and agents to investigate into the facts of the issuance of said bonds and into the proceedings taken by the city officials in issuing the same (Rec., pp. 39, 40-1), and were informed by the opinions of their said attorneys of facts which rendered it their duty to pursue said investigations, and their said attorneys and agents, in the course of said investigation did have full and actual knowledge of the said notice of election and of the said ordinance recited in said bonds and of all the other facts concerning the issuance thereof, and such knowledge of such agents and attorneys was and became the knowledge of all purchasers of said bonds.

And said findings further show that all purchasers of said bonds had notice that the statute under which the same purported to have been issued conferred no authority upon the city officials to issue negotiable bonds which would have the effect of putting off defenses against the city or of estopping the city or precluding the city from setting up, as against such purchasers, the actual facts concerning the validity of said bonds.

(Error Assigned, Rec., pp. 297-9.)

XXXIII.

That the court erred in rendering judgment in favor of the plaintiff and against the defendant, because the find-

ings of fact do not support the judgment in this: That said findings show that no election was ever held in the city of Santa Cruz, or by the electors thereof, for the purpose of determining the question of issuing bonds to refund the outstanding indebtedness of said city, evidenced by bonds and warrants thereof, and that the findings further show that the bonds in question here were illegally issued, without the assent of two-thirds of the qualified electors of said city of Santa Cruz, or any number or portion of the qualified electors of said city of Santa Cruz, voting at an election held for that purpose, as required by Section 18 of Article XI of the constitution of the State of California.

(Error Assigned, Rec., p. 299.)

XXXIV.

That the court erred in rendering judgment in favor of the plaintiff and against the defendant upon the findings of fact made and filed herein, because the said findings of fact are insufficient to sustain the judgment in that the statute of the State of California, approved March 1, 1893, required that the election should be called and held in the same manner as other elections are held in such city or town, and that the notice of such election should recite the indebtedness to be refunded, together with the denomination, character, time of payment, rate of interest, as well as all other details of the bonds proposed to be issued; and the findings show that the bonds in ques-

tion recited that they were issued under said statute and in pursuance of a special election called and held under said statute and in pursuance of an ordinance of the city of Santa Cruz calling said election and submitting said question of refunding to said electors, and that said notice of election and said ordinance were matters of public record required by law to be kept and open to the inspection of all, and such ordinance and notice of election were and constituted notice to all intending purchasers of the invalidity of said bonds, and of the fact that the city authorities, in passing said ordinance and calling said election, had proceeded without authority or jurisdiction, and that the indebtedness proposed to be refunded was not such indebtedness as said statute authorized to be so refunded, and was not an indebtedness of the said city of Santa Cruz (Rec., pp. 19-20, 26 to 39).

And said findings further show that no other recitals in said bonds could estop said city from setting up the facts aforesaid as against purchasers of said bonds, and that the decision of the question whether said indebtedness was the indebtedness of the city of Santa Cruz was not by law remitted to the determination of said city officials and could not be concluded by any recitals in said bonds.

(Error Assigned, Rec., pp. 299-300.)

XXXV.

That the court erred in rendering judgment in favor of the plaintiff and against the defendant upon the findings

of fact made and filed herein, because said findings are insufficient to support the judgment in that there is no finding of fact that E. G. & E. Wallace were bona fide purchasers of said bonds or purchasers thereof without notice.

(Error Assigned, Rec., p. 300.)

XXXVI.

That the court erred in rendering judgment in favor of plaintiff and against defendant upon the findings of fact made and filed herein, because the findings are insufficient to support the judgment in that the complaint alleges that the defendant, for value received, delivered the 360 bonds, with the coupons thereto attached, to one Walter Stanton, who afterwards, and before the maturity thereof, sold and delivered to the plaintiff herein the nine bonds of the first series, numbered from 1 to 9, both inclusive, and 282 of the coupons maturing on April 15, 1895, which allegations of said complaint were denied by the answer, and there is no finding upon said issues, and no finding that said bonds were so delivered to Walter Stanton, or that Walter Stanton afterwards sold or delivered the same or any thereof to the plaintiff herein.

(Error Assigned, Rec., p. 300.)

XXXVII.

That the court erred in rendering judgment in favor of plaintiff and against the defendant upon the findings of

fact made and filed herein, because the findings are insufficient to support the judgment in that there is no finding that the assignors of plaintiff were purchasers in good faith and for value, in that it is not found that such purchasers did not have notice of facts sufficient to put them upon inquiry as to the validity of said bonds, nor that such inquiry, if prosecuted with reasonable diligence, would not necessarily have resulted in the disclosure of the facts showing the invalidity of said bonds.

(Error Assigned, Rec., p. 300.)

XXXVIII.

That the court erred in rendering judgment in favor of plaintiff and against the defendant upon the findings of fact made and filed herein, because the findings are insufficient to support the judgment in this: That the findings show that the attorneys whose opinions were submitted to E. G. & E. Wallace and F. H. Prince & Company were the agents and attorneys of E. G. & E. Wallace, and that E. G. & E. Wallace, before purchasing said bonds, had actual notice that the said F. H. Prince & Company and the said attorneys had and had examined the ordinances and other proceedings recited in said bonds and had actual knowledge of all the facts showing the invalidity of said refunding issue, and that the knowledge of said attorneys and of said agents was the knowledge of the said E. G. & E. Wallace (Rec., pp. 39, 40-1).

(Error Assigned, Rec., pp. 300-1.)

XXXIX.

That the court erred in redering judgment in favor of plaintiff and against defendant upon the findings of fact made and filed herein, because the findings are insufficient to sustain the judgment for the reasons and in the particulars assigned and specified in Assignments of Error Nos. 47, 48, 49, 50, and 51, as set forth in the record herein on pages 290 to 297.

(Error Assigned, Rec., p. 301.)

XL.

That the court erred in rendering judgment in favor of plaintiff and against defendant upon the findings of fact made and filed herein, because the findings do not support the judgment in that it appears from said findings that on March 13, 1894, the defendant had an outstanding bonded indebtedness of $271,000, which indebtedness had been incurred in the acquirement of public improvements by said city of Santa Cruz (Rec., pp. 19, 26, 29, 34-5).

And the findings further show that the issuance of the refunding bonds in question created an indebtedness in excess of the limitation imposed by the act of the legislature of the State of California, approved March 11, 1891 (Rec., pp. 19, 26, 29, 34-5), which said act provides that no city, town, or municipal corporation shall incur an indebtedness for public improvements which shall in the aggregate exceed 15 per cent. of the assessed value of

all taxable real estate and personal property of such city, town, or municipal corporation (Stats. of 1891, p. 84).

(Error Assigned, Rec., p. 301.)

XLI.

That the court erred in rendering judgment in favor of plaintiff and against defendant upon the finding of fact made and filed herein, because the findings are insufficient to support the judgment in this: That the findings show that, apart from the question of estoppel by recitals and the rights of a bona fide purchaser for value before maturity, the bonds were invalid and constituted no obligations of the city on account of the failure to comply with the conditions upon which, under the statute pursuant to which they purport to have been issued, such bonds could be issued, and no authority existed under the laws of California on the part of such municipalities as the defendant to issue negotiable bonds, and by the law of California the issuance of such bonds is not within the scope of the general and ordinary powers of the municipality, and such bonds can be legally issued only by express authority of the legislature. All who deal in such bonds are bound to know the authority under which and in pursuance of which they were issued, and are bound at their peril to know that the mode prescribed for the issuance of valid municipal bonds was in fact followed in the issuance of the bonds in which they are dealing, and they are not permitted to

rely even upon the recitals contained in the bonds, and that want of authority in municipal officers cannot be supplied by their unauthorized acts or representations, and that, in this case, as the findings show, there was no authority to make this refunding issue, and the indebtedness proposed to be refunded was not a valid city indebtedness evidenced by its bonds or warrants (Rec., pp. 19, 26, 29, 30, 34), and the election was not legally held according to statute (Rec., pp. 19, 20, 32-3, 39), and the bonds were not sold and issued in the mode prescribed by the statute (Rec., pp. 20 to 23-4), no recitals in the bonds and no decision or determination by the city officials could give validity to the issue or estop the city from setting up, even as against bona fide purchasers, the invalidity of the bonds, and, by the laws of California, every person dealing in such municipal bonds is bound at his peril to inquire whether they were issued in the mode prescribed, and, as the mode is the measure of the power, the bonds are void in the hands of a holder for value without actual notice; and by the laws of California the officers authorized to issue these bonds upon the conditions prescribed in the statute were not the appointed tribunal to decide the fact which constitutes the condition, and, consequently, their recitals will not be accepted as a substitute for proof.

That by the law of the State of California, municipal bonds are assignable contracts merely and subject, in the hands of holders, to all the equities existing in favor of

the municipality issuing such contracts; that there is no constitutional or statutory authority in the State of California conferred upon the officers of municipalities to make such recitals as those contained in these bonds; that those officials have given them by statute simply power to do certain acts and make those acts matters of public record as required by law; having done so, their functions with respect to them and their legal effect cease. They have no power to determine the result of any special election on the question of issuing bonds or contracting indebtedness. They were not authorized to bind the city of Santa Cruz by any statement which they might make concerning such election or concerning the results of such election, nor to determine whether such election was duly or legally called, or held, or conducted, nor to determine whether notice of such election was duly or legally given or published as required by law, nor had they any power to certify or declare that all or any of the acts, conditions, or things required by law to be done precedent to the issue of the bonds in question, or of any bonds, were properly done, or properly happened, or were properly performed in legal or due form as required by law. These recitals, being neither authorized by law nor matters within the power of determination of the city officials, the city is neither concluded nor estopped in any manner by such recitals.

(Error Assigned, Rec., pp. 301-2.)

PART THIRD.

BRIEF OF ARGUMENT.

I.

THE JUDGMENT OF THE CIRCUIT COURT, IN FAVOR OF THE PETITIONER AND AGAINST RESPONDENT, WAS PROPERLY REVERSED BY THE CIRCUIT COURT OF APPEALS, BECAUSE THE FINDINGS OF FACT OF THE CIRCUIT COURT UPON WHICH THE JUDGMENT WAS BASED SHOW THAT THE BONDS AND COUPONS IN QUESTION, AND EACH AND ALL OF THEM WERE INVALID AND VOID, IN THIS: THAT SAID BONDS AND COUPONS WERE IN PART ISSUED FOR AN UNLAWFUL PURPOSE, NAMELY: TO REFUND THE DEBT OF A PRIVATE CORPORATION; THAT THE FACTS SHOWING SUCH INVALIDITY WERE MATTERS OF PUBLIC RECORD OPEN TO PUBLIC INSPECTION AND REQUIRED BY THE LAWS OF THE STATE OF CALIFORNIA TO BE SO MADE MATTERS OF PUBLIC RECORD AND TO BE ENTERED AND KEPT "IN LARGE, UNIFORM, WELL BOUND, AND SUITABLE BOOKS," SO OPEN TO PUBLIC INSPECTION *(Findings Nos. 3, 5, 6, 8, 10, and 15, Rec., pp 18 to 23, 24, 26; Additional Findings Nos. 1 and 2, Rec., pp. 27, 34; Error No. 49, Rec., pp. 292-3-4-5; Error No. 50, Rec., pp. 296-7; Error No. 51, Rec., p. 297; Error No. 52, Rec., pp. 297-8; Error No. 54, Rec., pp. 299, 300; Error No. 59, Rec., p. 301; Error No. 61, Rec., pp. 301-2).*

Specifications, Supra pp. 96 & 121.

The decision of the United States circuit court of appeals, which is here in question, is based upon the findings of the trial court that: (1) the municipal bonds and coupons in question were issued, in part (indistinguishable), to refund the debt of a private corporation (Rec., pp. 18, 20, 26-7, 34); (2) that the facts showing the said purpose for which said bonds were in part issued were matters of public record (Rec., pp. 19, 20, 26-7, 34); (3) the laws of California requiring those very facts to be made matters of public record, open to public inspection (Stats. Cal., 1893, p. 59; Stats. 1875-6, p. 203), and (4) the laws of California rendering the act of issuing bonds to refund such debts invalid and void (Const. Cal., Art. XI, Sec. 18, Henning's Edition, pp. 171-2; Stats. Cal., 1875-6, p. 193, Sec. 10; Stats. Cal., 1893, p. 59).

The decision of the circuit court of appeals is ably sustained in the prevailing opinion of that court, which is printed in full in the transcript of record herein, at pages 309 to 316, to which we invite the careful consideration of this Court.

We desire, at this point, to call attention, particularly, to the following language of the court, in that opinion:

"The federal courts have always protected with a firm "hand the rights of bona fide creditors of municipal cor- "porations, uniformly holding that the bonds issued by "such corporations under granted power, negotiable in "form, are valid in the hands of a bona fide holder, not- "withstanding irregularities in their issue, or even in

" the non-performance of prior conditions, where the de-
" termination of the facts of such performance are by
" the law left to the determination of the municipal offi-
" cers, and they incorporate in the bonds which are put
" upon the market proper recitals of such performance.
" The obvious reason for this is, that where the law under
" which such securities are authorized to be issued com-
" mits to the municipal representatives the determina-
" tion of the conditions precedent, and those representa-
" tives recite upon the face of the bonds such perform-
" ance, common honesty demands that the municipality
" be estopped to deny the truth of the recitals as against
" the bona fide purchaser of the bonds. But it is equally
" well settled that where the power to issue such bonds
" did not exist, or where the law under which they are
" issued requires certain facts to be made a matter of
" record, open to the inspection of every one, there can
" be no implication that it was intended to leave such
" facts to be determined by the officers charged with the
" duty of issuing the bonds and conclude by their recit-
" als, contrary to the facts so recorded (*Sutliff* vs. *Lake*
" *County Commissioners*, 147 U. S., 230; *Dixon County*
" vs. *Field*, 111 U. S., 83). * * *

"It will be noticed that there is in this act no express
" grant of power on the part of the municipal authori-
" ties to issue any bonds. There is an implied power;
" but the implication is, not to issue bonds for any and
" all purposes, but refunding bonds with which to take

"up the outstanding bonds and warrants of the city, "provided a majority of the qualified electors of the city "should so vote, upon the submission of the question to "them in the mode prescribed by the act. Whether the "then outstanding indebtedness of the city should be "refunded or not, was not left to the determination of "the municipal authorities, but they were by the statute "empowered to submit that question to a vote of the "qualified electors of the city, specifying in the notice of "election the indebtedness to be refunded, together with "all details of the proposed issue. The power thus con- "ferred on the mayor and council could only be exercised "at a meeting of the municipal board. Such bodies can "only act by order, ordinance, or resolution, as every "one is bound to know (*Wesson* vs. *Saline*, 73 Fed. Rep., "919; *15 Am. & Eng. Ency. of Law*, pp. 1028, 1029, 1030, "and cases there cited). In the present instance, the "action of the mayor and council was by ordinance, as "appears from the findings of the court below. Such "ordinance was a part of the public records of the city, "which by its charter are required to be kept 'in large, "'well bound, uniform, and suitable books' (Stat. 1875- "1876, p. 203).

"The indebtedness of the city, thus evidenced by its "outstanding bonds and warrants, and proposed to be "refunded by the issuance of other bonds, the act of "March 1, 1893, authorized the mayor and common "council of the city to specify, together with the details

"of the proposed issue, and submit the question of re-
"funding the specified indebtedness, upon the desig-
"nated terms, to the qualified electors of the city for de-
"termination. In the event the majority of the votes
"should be in favor of the proposition, then the muni-
"cipal authorities were impliedly empowered to issue
"refunding bonds therefor, but for no other purpose.
"The public record which the act of March 1, 1893, taken
"and read, as it must be, in connection with the charter
"of the city, required to be made by order, ordinance,
"or resolution, disclosed to all the world the specific in-
"debtedness that it was proposed by the municipal
"authorities to refund, and in respect to which the quel-
"ified electors of the city were called upon to vote. The
"officers impliedly charged with the issue of such re-
"funding bonds were not in any manner authorized to
"make any certificate or representation to prospective
"purchasers in respect to the character of the indebted-
"ness evidenced by outstanding bonds or warrants of
"the city in lieu of which the refunding bonds were
"authorized to be issued. On the contrary, the statute
"itself was clear notice to every person that upon the
"records of the governing body of the city was required
"to be entered the specific indebtedness proposed to be
"refunded, together with the details of the proposed is-
"sue of refunding bonds, and that it was only for such
"specified indebtedness that any refunding bonds could
"be issued. To that record every purchaser was re-

"ferred by the very act under which alone the bonds in "suit were issued. The notice of election directed by "this act to be prescribed by the mayor and common "council of the city, occupies substantially the same "position that the resolution did in the case of *Lehman* "vs. *City of San Diego,* which was lately before this "court, and is reported in 83 Fed. Rep., 669.

"The present case is, we think, clearly within the doc- "trine of that case, and of *Sutliff* vs. *Lake County Com-* "*missioners, supra,* and *Dixon County* vs. *Field, supra,* "and kindred cases, and must be ruled by them."

The foregoing views and conclusions of the circuit court of appeals are fully supported by the findings of the trial court, the statutes of California, and the authorities.

It is well settled that a municipality has no power to issue negotiable bonds, except upon statutory authority and subject to the restrictions and directions of the enabling act.

Aetna Life Ins. Co. *vs.* Lyon Co., 44 Fed., 329.
Young *vs.* Clarendon Tp., 132 U. S., 340.
Merrill *vs.* Monticello, 138 U. S., 673.
Hedges *vs.* Dixon Co., 150 U. S., 182.
Concord *vs.* Robinson, 121 U. S., 165.
Daviess County *vs.* Dickinson, 117 U. S., 657.

See, also, opinion of DeHaven, J., in this case (Rec., p. 52, Sub. 4).

"When the law confers no authority to issue the bonds "in question, the mere fact of their issue cannot bind "the town to pay them, even to a purchaser, before ma- "turity and for value."

Hopper *vs.* Covington, 118 U. S., 148.
Marsh *vs.* Fulton Co., 10 Wall., 676.
East Oakland *vs.* Skinner, 94 U. S., 255.
Buchannan *vs.* Litchfield, 102 U. S., 278.
Dixon Co. *vs.* Field, 111 U. S., 83.
Hayes *vs.* Holly Spring, 114 U. S., 120.
Daviess Co. *vs.* Dickinson, 117 U. S., 657.
Merrill *vs.* Monticello, 138 U. S., 673.
Dillon on Mun. Cor., par. 89.

The refunding act in question (Stats. Cal., 1893, pp. 59, 60) restricts the refunding therein authorized, to the "*outstanding indebtedness of the city, evidenced by* "*bonds and warrants thereof.*"

It is now firmly established that municipalities will not be estopped by recitals contained in the bonds, unless the recitals relate to matters of fact which it may be fairly presumed that the officers of the municipality were left to determine.

Town of Coloma *vs.* Eaves, 92 U. S., 484, 490.
Dixon County *vs.* Field, 111 U. S., 83.
Lake County *vs.* Graham, 130 U. S., 674.

National Bank of Commerce *vs.* Town of Granada, 10 U. S. App., 692.

It is also well settled that recitals cannot be relied upon as an estoppel where the facts recited are matters of public record and are open to the inspection of every one who is disposed to make inquiries.

Sutliff *sv.* Lake Co. Commissioners, 147 U. S., 230.
Dixon County *vs.* Field, 111 U. S., 83.
Nesbitt *vs.* Riverside Ind. Dis., 144 U. S., 610.
Northern Bank of Toledo *vs.* Porter Tp. Trustees, 110 U. S., 608, 615.
Valley County *vs.* McLean, 49 U. S. App., 131.
Dudley *vs.* Board, 49 U. S. App., 336.

U.S. Tr. Co. v Vil. of Minn. Ridge 144 3.

The outstanding indebtedness of the city of Santa Cruz is a matter of record; the books of the city treasurer must show at all times what bonds of the city are outstanding; the ordinance record of said city required by law to be kept is open to all who may wish to know what bonds have been issued by the city. The charter of the city provides (Sec. 40, p. 204, Stats. of Cal., 1875-6, that the city clerk, at the end of the fiscal year, "shall make a full and detailed statement of the re-"ceipts and expenditures of the city during said year, "specifying the different sources of revenue and the "amounts received from each, the several appropria-"tions made by the common council, and the objects

"for which they were made, and the amount of money "expended under each, *evidences of indebtedness issued*, "and what portion thereof remains outstanding, with "the rate and amount of interest due thereon and the "amount of cash on hand."

To these records the common council and the public alike must go to ascertain the amount and character of the outstanding indebtedness of the city. Moreover, the act of 1893, under which the alleged refunding bonds were attempted to be issued, expressly provides that the notice of election shall recite, "*the indebtedness "to be refunded.*" This notice was by statute intended to be a record open to the world, disclosing the nature of indebtedness proposed to be refunded; and, if it appears therein (as it did in this case) that the refunding issue was to refund not only the bonds of the city, but the bonds of a private corporation as well, no false recital in the bond can be relied upon to cure the defect thus formally recited in a public record.

It was said by the Supreme Court of the United States, in Sutliff *vs.* Lake County Com., supra: "Upon "these facts, in the light of the previous decisions of "this Court, it is clear that the plaintiff, although a "purchaser for value and before maturity of the bonds, "was charged with the duty of examining the record of "indebtedness provided for under the statute of Colo- "rado, in order to ascertain whether the bonds in- "creased the inebtedness of the county beyond the con-

"stitutional limit, and that the recitals in the bonds "did not estop the county to prove by the records of "the assessment and the indebtedness that the bonds "were issued in violation of the constitution.

"In those cases in which this court has held a muni- "cipal corporation to be estopped by recitals in its "bonds, to assert that they were issued in excess of the "limit imposed by the constitution or statutes of the "State, the statutes as construed by the court, left it to "the officers issuing the bonds to determine whether the "facts existed which constituted the statutory or con- "stitutional conditon precedent, and did not require "those facts to be made a matter of public record.

"But if the statute expressly requires those facts to "be made a matter of public record, open to the inspec- "tion of every one, there can be no implication that it "was intended to leave that matter to be determined "and concluded contrary to the facts so recorded by "the officers charged with the duty of issuing the "bonds."

Again, in Dixon County *vs.* Field, supra, the Supreme Court said: "If the fact necessary to the existence of "the authority was by law to be ascertained, not offi- "cially by the officers charged with the execution of "the power, but by reference to some express and de- "fined record of a public character, then the true mean- "ing of the law would be that the authority to act at "all depended upon the actual objective existence of

"the requisite fact as shown by the record, and not "upon its ascertainment and determination by any "one, and the consequence would necessarily follow "that all persons claiming under the exercise of such "power might be put to the proof of the fact, notwith- "standing any recitals in the instrument."

Following the reasoning of the Supreme Court in the Dixon County case, it must be held that while the common council of the city of Santa Cruz were bound, it is true, to learn from the records of the city what the limit upon their authority was, and what bonds of the city of Santa Cruz were outstanding, as a necessary preliminary in the exercise of their functions and the performance of their duty, yet the information thus obtained was for themselves alone. "All the world besides "must have it from the same source and for themselves. "The fact, as it is recorded, * * * is extrinsic, and "proves itself by inspection, and concludes all determi- "nations that contradict it."

Where the statutes of a State (as in California) provide that municipal corporations shall have power to make and publish from time to time ordinances providing for the method of binding municipal corporations regarding the issuing of bonds, the holder of negotiable bonds purporting to have been issued by such a corporation under the provisions of such statutes is bound to

know independently of the recitals in the bond that there is such an ordinance in existence.

> Hinkley *vs.* Arkansas City, 32 U. S. Appeals, 640.
> See, also, Dudley *vs.* Board of County Comrs., 49 U. S. App., 336, and Valley Co. *vs.* McLean, 49 U. S. App., 131.

The bonds having been issued, in part for an illegal purpose, and as it is impossible to segregate or distinguish the valid from the invalid bonds, the whole issue is void.

> Aetna Life Ins. Co. *vs.* Lion Co., 44 Fed., 329.
> Hedges *vs.* Dixon Co., 150 U. S., 182.
> Coffin *vs.* Indianapolis, 39 Fed., 221.

U.S. Tr. Co. v. Vil of Mun. Ridge, 104 3

The enabling act under which the bonds in question were issued required notice of election to be given by the mayor and common council (Stats. of California, 1893, p. 59). This notice was made jurisdictional by said act, which provided that such notice should recite the indebtedness to be refunded, together with all details of the proposed issue. This power could be exercised in one mode only, to wit, by proceedings duly held at a meeting of the mayor and common council duly assembled as a board and spread upon the public records as a permanent record of a public character and open to the inspection of all. This results from the provisions of the enabling act of 1893, construed and read as it must be in connec-

tion with the charter of the city of Santa Cruz (Stats. of California 1875-1876, pp. 189-207).

There is no other conceivable way in which the notice of election specified in the statute could be given. The mayor and the council must give it and provide for it, and they must do it officially and in the manner provided by the charter, to wit, by ordinance, for in no other way could they act or proceed.

Jersey City *vs.* Central, etc., 40 N. J. Eq., 419.
People *vs.* Bailache, 52 Cal., 310.
Dey *vs.* Mayor, 19 N. J. Eq. P., 416.
Schumm *vs.* Mayor, 24 N. J. Eq. P., 153.
15 Am. & Eng. Encyp., pp. 1028, 1029.
Stevenson *vs.* Bay City, 26 Mich., 46.
Talcott *vs.* Noell, 78 N. W., 39, 40.
Lehman *vs.* San Diego, 83 Fed., 670.
Wasson *vs.* Saline, 73 Fed., 919.

The ordinances of the mayor and common council were public records, required to be kept "separately, in "large, well-bound, uniform, and suitable books" (Stats. California 1875-1876, sec. 40, p. 203); such an ordinance was so adopted, recorded, and kept as a public record (findings, Rec., pp. 18, 19, 20, 21, 26, 39; opinion of circuit court, Rec., p. 52, sub. 4).

This brings the case at bar directly within the rule laid down in Lehman *vs.* San Diego, 83 Fed., 670; Dixon *vs.* Field, 111 U. S., 93 and Sutliff *vs.* Board, 147 U. S., 230,

and takes it out of the category of Hackett *vs.* Ottawa, and other cases relied upon by petitioner.

Suppose the statutes of 1893 had been worded thus:

"The governing body of any city or town having an "outstanding indebtedness, evidenced by bonds and war- "rants thereof, shall have power to pass an ordinance "and enter the same in its ordinance record, which shall "consist of large, well-bound, uniform and suitable "books, kept at all times open for public inspection, call- "ing, and prescribing the form of notice of, an election "to determine the question of refunding such indebted- "ness. Such notice shall recite and describe the par- "ticular bonds or warrants to be refunded, together with "the denomination, character, time of payment, rate of "interest, as well as all other details of the bonds pro- "posed to be issued; and such recital and description "shall fix the denominations of the refunding bonds at "not less than $100 and not more than $1,000, and the "principal and interest as payable in coin or currency "at the office of the treasurer or some designated bank, "such interest not exceeding 6 per cent. per annum. If "the requisite vote be in favor of refunding the indebted- "ness recited in said ordinance and notice, the bonds "specified and described in said notice and ordinance "shall be sold by said governing body to the highest bid- "der for not less than their face value."

If such had been the statute, the question before the court would be exactly the same.

Now, reading the statute with the charter, we have the statute supposed.

In other words, the legislative authority under which these bonds were issued is just what it would have been under the statute supposed, and we have a case legally identical with Lehman *vs.* San Diego. The acutest and most subtle metaphysics cannot draw a distinction between a statute authorizing the officials of a town to issue or sell *the bonds* specified, recited, or described in an ordinance already passed and recorded and a statute giving them power to issue or sell *the bonds* described, recited, or specified in an ordinance thereafter to be passed and recorded and thereby authorized.

The unsubstantial and only distinction between Waite *vs.* Santa Cruz and Lehman *vs.* San Diego is that in the latter the governing body of the municipality, without previous authority, enacted an ordinance providing for the issuance of certain specified, described, and recited bonds in a specified mode and upon certain declared conditions, and the legislature afterward ratified, confirmed, and made valid the ordinance, while in the former the legislature, in advance, enacted that the governing body should have power to enact a similar ordinance, and, on its ratification by the electors, might issue those specified, described, and recited bonds in the mode and upon the conditions set forth, recorded, and made certain in and by the terms of the ordinance, provided, however, that the ordinance should show on its face that the bonds to be issued were refunding bonds issued to take up pre-

vious indebtedness evidenced by bonds or warrants *of the city.*

It is obviously immaterial whether the legislature ratifies the ordinance, as in Lehman *vs.* San Diego, or authorizes it in advance, as in this case. The ratification is the equivalent, and cannot be more than the equivalent, of previous authorization. The substantial points of resemblance, or, rather, of absolute legal identity, between the two cases cover the whole ground of debate. In neither was there given or conferred by the legislature any *general* power to issue bonds, coupled with conditions on the exercise of the power, the right to determine the existence of which conditions rested *in pais* or in parol and was committed to the decision of the governing body either expressly or by any implication.

It was frankly and properly conceded at the oral argument of this case before the circuit court of appeals that Lehman *vs.* San Diego was properly decided and was but a corollary of Dixon *vs.* Field. But why is this necessarily so? Because the principle established in Dixon *vs.* Field, 111 U. S., 83, and Sutliff *vs.* Board, 147 U. S., 230, and kindred cases, is that if the statute *expressly* requires the facts constituting the condition precedent to the authority to issue the bonds to be made a matter of public record, open to the inspection of every one, *there can be no implication* that it was intended to leave that matter to be determined and concluded, contrary to the facts so recorded, by the officers charged with the duty of issuing the bonds.

In Lehman *vs.* San Diego the statute did expressly require the facts to be made a public record simply because under the statute the facts were required to be contained in the proceedings of the board. The ordinance ratified gave the board authority to issue the bonds when and to whom such board *might by resolution direct.* The court said: "Under the terms of the ordinance, no bond could "be issued or delivered except upon a resolution of the "board, *appearing upon its minutes or the records of its "proceedings*, thus furnishing a most important safe-"guard against fraud and an abuse of power. Every "person dealing in the bonds is bound, at his peril, to in-"quire whether they were issued in the mode pre-"scribed."

Lehman *vs.* San Diego, 83 Fed., 637.

That is, under the statutes and laws of California and by intendment and construction of law, a statutory requirement that a certain fact thall be embodied in a resolution or ordinance is an express requirement that it be made a matter of public record, open to the inspection of every one.

So, in Wesson *vs.* Saline, 73 Fed., 919, it is said: "Common councils, boards of commissioners, and like "municipal bodies can act only by order, ordinance, or "resolution, as every one is bound to know."

Consequently when a statute, as in the Lehman case, refers to an ordinance or resolution it means *ex vi termini*, something appearing on a public record, and by a

perfect parallelism the statute in this case (of 1893), by its reference to the notice of election, enacts and provides for a public record. The notice of election could be framed and devised only by the mayor and common council, and their acts must appear of record. This must be so on general principles, for in no other way can such bodies act at all; but in this case, as in the Lehman case, we need not rest the proposition on general principles alone. The statute of 1893, by the very act of directing certain action to be taken by the mayor and common council, incorporated into the statute the charter of Santa Cruz, prescribing in detail the mode and manner in which alone they could act, and consequently must be construed and read precisely and exactly as if it had said in so many words that the bonds could only be issued to refund an indebtedness of the city, *evidenced by bonds and outstanding warrants thereof, specifically recited and described in an ordinance spread on the records and minutes and transcribed and kept open for public inspection in large, legible, and well-bound books, etc.*

"The city clerk must keep separately, in large, well-"bound, uniform, and suitable books, an ordinance rec-"ord, in which shall be entered, in a good, round, legible "hand, all the ordinances passed by the common council, "and approved by the mayor of the city of Santa Cruz, "and said record shall be signed by the mayor and "countersigned by the city clerk of said city" (charter city of Santa Cruz, Stats. of Cal. 1875-1876, p. 203, sec. 40).

In this case, even if possible, more studiously and effectively than in the Lehman case, every feature of the legislation portrays the prevailing and controlling intention and purpose to interpose as a shield between the municipality and those dealing with its agents the important "safeguard against fraud and abuse of power" of a public and definite record, *expressly required by law*, and containing on its face the imperishable and unmistakable evidence of the jurisdiction of the officials, their compliance with their only letter and warrant of authority or their disregard of its limitations and conditions.

For these reasons and because there was no thought or wish to confer a general power to issue bonds and then to superadd conditions *in pais* determinable finally by the officials and concluded by their recitals as by the judgment of a court, the statute is mainly and in all substantials restricted and confined to and deals with matters not resting *in pais* and to be ascertained by perishable evidence in each given case, but with matters intrinsically and necessarily of record and ascertainable and determinable as well and as easily by intending dealers and purchasers as by the city officials.

There is no power given to refund the city indebtedness generally, but strictly and only that indebtedness the evidence of which must appear and can only appear by the written and recorded action of the council; and, then, carrying out the design, the notice of election is not, as usual, left to the will, discretion, or caprice of the

officials, but must conform to the statute and distinctly specify the very writings and records evidencing the debt, and the very bonds in every detail which, and which alone, can be issued and sold.

In this particular case the point is made still clearer, if possible, by the course pursued. It must be admitted that on one proposition the law is settled—that is, that no recitals can control or estop the municipality in regard to matters appearing on the face of the bonds. In the Sutliff case (147 U. S., 230), the statute required the officials, in submitting the question to the voters, to enter of record an order specifying the amount required, etc., and the court said that it was clear that the plaintiff, though a purchaser for value and before maturity, was charged with the duty of examining the record provided for in the statute in order to ascertain whether the bonds increased the indebtedness beyond the limit, and "that the recitals in the bonds did not estop the county "to prove by the records * * * that the bonds have "issued in violation" of the authority, etc., and that in such case there was no implication of authority in the officials to conclude the matter contrary to the facts so recorded.

Now, here, by a perfect parity of reasoning, the statute of 1893 required the officials, in submitting the question to the voters, to enter of record a statement specifying the indebtedness to be refunded, etc., and equally all purchasers were bound to examine that record in order to ascertain whether the specified indebtedness was such

as could be refunded, etc., and no recitals could estop or conclude in that regard. But there has never been any doubt as to whether a statement made or fact appearing on the face of the bonds, whether required to be made by statute or not, prevents a purchaser from relying on recitals to the contrary of that fact if true; and so in the Sutliff case and other cases, some of which are there cited, it is held that when the amount of the bonds is stated on their face, that is sufficient to notify the purchaser. If, in this case, the notice of election had been copied into the bond in full, and so the bond had shown on its face its utter invalidity, it would not be, and is not contended there could be, any recovery. In such case, as, by necessary implication, is laid down in the Sutliff case, the purchaser is required to know the facts contained in the records required by law to be made, and also whatever facts are stated on the face of the bond; and if, by putting both together, he can ascertain or must know that the officials have exceeded their power, he cannot recover; and in Chaffee *vs.* Potter, 142 U. S., 363, it is expressly said: "If the face of one of the bonds had "disclosed that, as a matter of fact, the recital in it, with "respect to the constitutional limit, was false, of course "the county would not be bound by that recital, and "would not be estopped from pleading the invalidity of "the bonds in this particular."

So in Oxford *vs.* McClure, 4 Otto, 429, it is said: "These bonds, therefore, carried on their face unmistak-

"able evidence that the forms of law under which they "purported to have been issued had not been complied "with. * * * If a purchaser may be, as he some- "times is, protected by false recitals in municipal bonds, "the municipality ought to have the benefit of those that "are true."

The bonds in suit show on their face two things that are true: First. That they are issued for the purpose of refunding *bonded* indebtedness. Second. That they are issued in pursuance of and in conformity with *ordinances* of the city and of a notice of election given as required by the statute, and therefore reciting the indebtedness refunded.

Taking, then, the statute and the face of the bond together, as he must, the purchaser is charged with knowledge that it was only bonds and not warrants that were attempted to be refunded; that the election was called by *ordinance*, and that the ordinance recited and specified the particular bonds, and was made a public record accessible to all, and kept in large, well-bound books, and also (though this is not essential here) that there were like public records, by reference to which he could ascertain whether the bonds recited were outstanding.

Another correspondence between this and the Lehman case is that in both the courts are to construe statutes of California and administer them in the light of the previously settled jurisprudence and course of decisions in California. In the late case of O'Brien *vs.* Wheelock, 95

Fed., 905, in which the opinion was written by Mr. Justice Harlan, it was laid down that although the act under which these bonds were issued may not have been the subject of judicial construction (by the State Court) before the rights of the plaintiff accrued, this court should give effect *to any rules of construction* that may have been previously established by the highest court of the State when interpreting similar provisions in other statutory or constitutional enactments.

Now in Sutro *vs.* Pettit, 74 Cal., 334, decided in 1887, a statute of 1870 had authorized the supervisors to issue bonds "not exceeding in the aggregate the sum of $40,-"000," and provided for a register of said bonds to be made of record. The supervisors, as the record in that case shows, issued four hundred and twenty bonds of one hundred dollars each, making, of course, an overissue of two thousand dollars. Those bonds recited that they were issued under the statute of 1870, and there was nothing on the face of each bond to show the amount of the total issue. These bonds were in form negotiable and interest was paid on them for several years, and on the first day of January, 1880, they were outstanding and unpaid.

Then a statute, of which, in some respects, the statute under which the bonds in suit in this case is a literal copy, was enacted, providing that the supervisors of any county having an outstanding indebtedness *evidenced by bonds or warrants thereof*, might refund the same, etc.,

and in supposed accordance with such provision new bonds were issued and sold.

A suit was brought by holders of the old bonds to compel the treasurer to pay them out of the proceeds of the new. The treasurer had paid the old issues from 1 to 400, but refused to pay those numbered from 401 to 420.

Prior to the reissue the supervisors passed a resolution declaring all the old bonds valid.

It was argued for the plaintiff that the determination of the supervisors was final and conclusive as to the validity of the bonds; that they were not void, and that power was given to issue them, and that there was nothing on the face of the bond showing it to be an overissue, and no accessible record showing the amount issued under the act, and that even if the bonds, as such, were invalid, the action of the supervisors in refunding them cured the defect.

For the defendant, it was argued that the supervisors had only the power expressly conferred or necessarily implied, and the bonds being an overissue were void, *even as to bona fide purchasers;* that as the bonds referred to the statute, the holder had notice of the terms of the statute. The court held that the decisions giving conclusive effect to recitals on the theory that the final determination of the truth of the recitals had been committed to the municipal authorities—a theory which underlies and is essential to the position of counsel for the present plaintiff and all the cases they rely upon—had no applicability or effect. That the validity of the

bonds "did not depend upon any fact—any matter *in* " *pais*—to be determined by the supervisors." That the power to issue the bonds, and the limitation of the power, depended wholly upon the language of the statute, and nothing was left to the decision of the officers. That neither the doctrine of estoppel, or of ratification, or of *bona fide* holding could be invoked. That in California the issuance of bonds is not within the scope of the general and ordinary powers of a board of supervisors, and that such bonds can only be issued by virtue of *express* authority of the legislature; and that the slightest inquiry would have disclosed the worthlessness of the bonds. That an overissue of twenty thousand dollars would have been no less valid than the overissue of two thousand dollars; and that any other rule than the rule of strict construction and denial of implied authority to recite away the limitations of the authority conferred, would put the people of the municipality in the complete power of careless or unscrupulous public officers; and that "*the character of one void act of public* " *officers cannot be changed by a second void act of the* " *same officers declaring the first acts to be valid.*"

This, we submit, was a direct adjudication settling and promulgating the law of California on the vital and controlling question under discussion on this branch of this case. A decision and enunciation long antedating the transaction in question and never since questioned or qualified. So that in strict accordance with what Justice Harlan said in O'Brien *vs.* Wheelock, 95 Fed., p.

906, when the statute under which the bonds in suit were issued was passed, and when the bonds were issued and when they were purchased, every one had notice that by the settled course of decision in California, even a statute expressly conferring the power to refund, and not, like that of 1893, giving no *express* power to do anything but *make up a record* of the action of the electors or some other body or tribunal, and couched in the same language, to wit, "having an *outstanding indebtedness evi-* "*denced by bonds* or warrants thereof," does not fall within the "line of judicial decisions in cases where the "validity of municipal bonds depended on the happening "of some precedent contingency of fact, and the ques- "tion was, whether the officers executing the bonds were "vested with the discretion or power to determine if the "contingency had happened. * * But * * the "validity of the bonds * * did not depend upon any "fact—any matter *in pais*—to be determined by the su- "pervisors (or other officials); * * there was noth- "ing left to the discretion of the officers, etc."

Sutro *vs.* Pettit, 74 Cal., pp. 335-6.

Again, in McCoy *vs.* Briant, 53 Cal., 247, it is laid down as the California doctrine that "*every person deal-* "*ing in bonds is bound, at his peril, to inquire whether* "*they were issued in the mode prescribed; and as the* "*mode is the measure of the power, the bonds would be* "*void in the hands of a holder for value, without actual* "*notice, if issued in any other mode.*"

This enunciation is in perfect harmony with that in Sutro *vs.* Pettit; and applying it to the facts here, it may be said, as was said there, concerning the resolution, that the requirement of a specification of the bonds in the notice of election cannot be regarded as merely directory, but, on the contrary, was intended as a precaution against an abuse of the power granted. Construing the statute of 1893 in the light of this doctrine, as was done with the statute in the Lehman case, how can the conclusion be reached that it was the intention of the legislature to commit to the city officials the power to decide whether the bonds refunded and recited in the notice of election constituted indebtedness of the city *evidenced* by bonds *thereof*, or to conclude by any recitals the question whether the limited and implied power so grudgingly conferred had been followed or exceeded, or the mode presented disregarded? By adopting the language of the statute construed in Sutro *vs.* Pettit, it is elementary law that the construction was adopted with the language, and every variation between that statute and the statute of 1893 but strengthens the argument against the propriety of putting on the statute of 1893 any more latitudinarian construction.

Clark *vs.* Town of Northampton, 105 Fed., 312, furnishes a very recent and pointed illustration of our position in this behalf. There, in answer to the position that the *bona fide* holder of municipal bonds should not be required to go beyond the determination of the officials

charged with the execution of the statute, it was said that the proposition seemed to be sustained by a long line of Federal adjudications, such as City of Evansville *vs.* Dennett, 161 U. S., 434.

But in deference to the *prior* settled course of state adjudication, the bonds were held invalid.

It has been said in the cases in the Supreme Court of the United States decided before Dixon *vs.* Field established the correct, if not a new, rule (see opinion of Brewer, J., in Polton *vs.* Board, 33 Fed., 615) that if it be the law that certain facts must appear, the question is: To whom must they appear and when? Who is to decide? etc. But under the statute of 1893 these questions are easily and must be differently answered. By the express mandate of the statute, they must be decided when the notice of election is framed, and must then be made to appear on the face of the record. If the officials were finally to decide and embody their decision in the recitals, there was no necessity for reciting the facts in the notice of election; and even in the first instance, all they could decide was whether to take the decision of the electors on the question of refunding certain specified bonds and issuing other specified bonds. Then, as soon as the electors decided the question submitted, the record was made up and the decisions a finality. There is absolutely nothing in the statute from which can be implied any power to alter, vary, or depart from this decision. The whole express power given by the statute had been exercised and exhausted. Nothing remained

but the *implied* power to issue the exact and very bonds described in detail in the recorded decision and action of another and different tribunal—the electors—passing on a definite issue and question made up and presented to them. Unless this be so, it would follow that the statute gave implied power to vary at will the details, amount, etc., of the *new* bonds, and to ruin the city by issuing them for any amount they saw fit. For this, we presume, no one would contend, and it is to us inconceivable that upon any construction of this statute there can be found a legislative intent to commit to the city officials the power of deciding contrary to the facts plainly apparent on the face of the recorded notice of election what particular bonds were to be refunded, and by the self-same language in the self-same statute to deny them the power to decide in like contrariety what particular bonds could be issued for the very and only purpose of refunding the particular outstanding bonds specified.

We beg leave to repeat and emphasize the controlling facts and consideration peculiar to this case and distinguishing it from all those decided by the Supreme Court which are cited against respondent on this proposition, that by the statute (1893 Cal., p. 59) the whole of the first section down to the words "said bonds shall be sold by such city council, etc." deals with the making of the record which is to evidence the decision and determination of the electors. From the rest of the section must be *implied* all the power conferred with reference

to the issuing of bonds. And that *implication* is limited and restricted and confined to the sale and issuance of the very identical bonds required by the preceding provisions to be described in minutest detail in the record already made up. The statute is express on this point. It says "said bonds" shall be sold, etc., and it must be construed as if it had said "the bonds so described in said "notice may be issued, sold, etc." We cannot imagine that any legislator or proposer or framer of an act intended to confer the power to make an unlimited issue of bonds, and to decide *de novo* and finally, without reference to any previous action, determination, or record, whether the facts giving the authority to make such unlimited issue existed, could have blundered into phrasing or wording the statute as this is expressed. The legislature is presumed to have known the existing state of the law, especially the previous decisions in California. If such dangerous and unfettered power had been contemplated, if it was the design to reverse the whole policy of the State and change the whole spirit of her jurisprudence, would the very language already construed not to confer this power have been adopted? Would such pains have been taken to cast aside and omit the express grant of power to issue bonds contained in the very statute they were amending? Would any proposal to amend this statute of 1893, when on its passage, by *expressing* the grant of power here sought to be fastened upon it by implication and construction have been even listened to or entertained for a moment?

Imagine a legislature gravely providing for a decision by the voters of a question of issuing certain bonds to be specifically described and spread upon the public records, then, after giving authority to certain officials to sell those specific bonds and no others, inserting in the same section of the same act a proviso as follows:

"Providing the city officials shall have exclusive and "final jurisdiction and authority to determine and de- "cide what the public record already exacted and pro- "vided for does recite and contain, and any recital in "the bonds sold by them shall be conclusive evidence of "the contents of said record and shall estop the city "from showing that the bonds issued and sold are not "those described in said record, no matter how great "may be the excess of the issue."

In the statute in the Sutliff case there was a requirement of a like record to ours, exhibiting in detail the debts, etc., of the county. The Supreme Court, in language which has never been recalled, said it was clear the purchaser was charged with the duty of examining the record, and that there could be no implication that it was intended to leave that matter to be determined and concluded contrary to the facts so recorded by the officers issuing the bonds, and cite Dixon *vs.* Field to the effect that the requirement of such a record is necessarily followed by the consequence that such purchasers are bound by the record, notwithstanding any recitals in the bond.

It thus appears that the statute of 1893 was drawn so as to meet the views of the Supreme Court, and so as in the plainest way to exclude the implication of any power to vary the record by recitals or otherwise. The statute on its face and by its controlling and most important provisions expressly refers intending purchasers to a record *explicitly* required to contain the authentic and only evidence of the facts made a condition of the lawfulness of the whole proceeding. If this record fails to show the jurisdiction and lawful exercise of the authority attempted to be exercised, *a fortiori*, if it affirmatively shows the contrary, the purchaser is held to knowledge, and there can be no estoppel. The case stands just like those where the statute requires the facts to appear on the face of the bond, as in Barnett *vs.* Dennison, 145 U. S., 135. Here, as there, we can say, the city was merely agent, possessing only such powers as were expressly given or *implied because essential to carry into effect those expressly granted*, and that the provisions of the statute must be strictly pursued, and the purchaser is chargeable with notice of the requirements of the statute.

Now, here the only *express* power was to frame and make of record a notice showing the facts on its face, and then, if the electors so decided, there was at most an *implied* authority to sell the very bonds specified. This, we may concede, for the sake of argument only, could be implied, because essential to carry into effect the express grant of power. But by what process of reasoning can

it be said that the further power to vary the record by recital must be implied as *essential* to carrying out the express grant? The very making of any operative recitals must affirm on the face of the bonds that the record required by the statute was made, and would thus as fully and effectually as a compliance with the statute in Burnett *vs.* Dennison inform the purchaser of all the facts necessary to enable him to know for himself whether the bonds were issued in accordance with law. What possible difference can it make in principle whether this statute required the face of the bond to specify the bonds to be refunded and those to be issued, or required the notice of election to make the same facts a matter of record? In the latter case, to protect the purchaser, there must be a recital on the face of the bond that the notice of record did state the facts, and, therefore, by intendment of law, the very face of the bond must, in the language of the Supreme Court, inform the purchaser that "there could be no implication that it " was intended to leave that matter to be determined and " concluded, contrary to the facts so recorded, by the offi- " cers charged with the duty of issuing the bonds."

Sutliff *vs.* Board, *supra.*

Here the requisite facts were not of a nature requiring examination and decision. They were like the assessed valuation of property, the consent or non-consent of the county in the Toledo case, the record of indebtedness in the Sutliff case, matters already determined and of rec-

ord, extrinsic facts, themselves conferring the implied power to issue the bonds. The statute does not confer express power to issue bonds generally and then affix conditions precedent, resting *in pais* and requiring examination and decision, but leaves the whole question and grant of power to an implication arising upon an extrinsic record, express power to make which is conferred. The purchaser cannot find in this statute any express power to issue bonds and infer that the conditions to its exercise have been fulfilled. He simply finds and *is told* by the statute in so many words that certain bonds described in a certain record, accesssible to all, shall be sold, *provided* that record recites an outstanding bond or bonds of the city as that to be redeemed or refunded by the sale. He is not led to believe that anything is left to the decision of the officials, but put on his guard and made to know that by the very proposition to sell they affirm that their only power and authority is already fixed and determined by a public record setting forth all the facts.

One distinction here to be noticed is somewhat analogous to that between a court or tribunal invested with *general* jurisdiction over a certain subject-matter, whose decisions within the scope of their jurisdiction import verity and cannot be collaterally attacked, and a jurisdiction which is special and can only arise or be exercised within certain defined limitations or upon the existence of certain extrinsic facts. In the latter case the

tribunal can never give itself jurisdiction by simply claiming it or erroneously deciding that it has it.

This is well illustrated by the cases where a probate court seeks to administer upon the estate of one living. The statute gives jurisdiction over the estates of decedents. It has been often argued and nearly as often overruled that such a statute by implication gives power to decide finally the question of life or death.

If this is the rule, even in cases of superior courts of general jurisdiction and where the record shows the jurisdiction on its face, how can there be any question in case of a special tribunal with limited jurisdiction whose decision, on its face, shows the lack or abuse of power? If any such special tribunal was created by this statute of 1893 it consisted not of the outgoing officials, but of the old council *and* the electors, and their determination, as made patent and of record by the notice of election, is conclusive against the validity of the whole proceeding. The very postulate that a record or judgment or other determination imports verity renders it *felo de se* if, on its face, it shows want of jurisdiction or power. For example, if a superior court of general jurisdiction, in granting probate, should recite the fact that the alleged decedent was still living.

So here the contention is that a special tribunal has been created and given power and jurisdiction to decide finally certain facts. That might be argued if the statute gave a *general* and express power to issue bonds and

specified certain limitations, formalities, and conditions *in pais* as regulating the exercise of the power.

But where, as here, the only power and jurisdiction conferred is special and to sell certain specified bonds or to refund certain specified outstanding bonds, it is precisely like the grant of power to administer upon certain specified estates. The case, then, is like the cases of Sutro *vs.* Pettit and Lehman *vs.* San Diego, and no question of the implication of authority to decide upon the fundamental, controlling, and jurisdictional facts, constituting the sole and special grant of power and jurisdiction, can arise, because "the validity of the bonds "issued did not depend upon any fact—any matter *in* "*pais*—to be determined by the supervisors. The power "to issue the bonds and the limitation of that power, "depended wholly upon the language of the act itself, "and not upon any extrinsic contingency; there was "nothing left to the discretion of the officers."

And the copying of the language of the old statute into the statute of 1893, thus carrying with it the construction already placed upon it, had the same effect as if the statute of 1893 had *in terms* enacted into the statute all the language quoted from Sutro *vs.* Pettit, and had thus expressly repudiated the implication of jurisdiction now sought to be fastened upon or injected into the statute by mere interpretation and construction.

"It is undoubtedly a question of local policy with each "State what shall be the extent and character of the

"powers which its various political and municipal or-
"ganizations shall possess; and the settled decisions of
"the highest courts on this subject will be regarded as
"authoritative by the courts of the United States."

Claibourne *vs.* Brooks, 111 U. S., 400.

The contents of this notice of election (setting forth, among other things, the proposed refunding of $89,000, par value, of the mortgage bonds of a private water company, Findings Nos. 5 and 6, Rec., pp. 19-20; Add. Fdg. No. 2, Rec., p. 34) have the same force and effect as the newspaper publication in McClure *vs.* Oxford, and the reasoning of the court applies here (4 Otto, 429). We submit it is shown that this case falls within Dixon *vs.* Field and the class to which it belongs, and not within Chaffee *vs.* Potter and kindred cases, and that, moreover, the special terms and framework of our statute and the settled previous doctrine of the California courts take it out of all the cases cited by petitioner; also, that we have already sufficiently marked out the distinction between this case and Hackett *vs.* Ottawa and other Federal cases cited on the effect of recitals merely referring to ordinances.

In Hackett *vs.* Ottawa, 99 U. S., 86, there was a *general* power and jurisdiction conferred. The power was expressly given to borrow money and to issue bonds therefor. The court said: "No limitation is prescribed as "to the amount which may be borrowed. Nor is any "express restriction imposed as to the objects or pur-

"poses for which bonds may be issued." There was no provision in the statute requiring the ordinance or the notice of election to contain any statement or recital as to the purposes for which the bonds were to be issued or in any other way providing for any record of the facts made in obedience to express requirement of the statute. There was, therefore, nothing in the statute or on the face of the bonds or in the recitals directing purchasers to any record of the facts. They were not required to know that there was a record showing whether the bonds were issued in compliance with the statute. They were expressly assured that there was none showing any failure to comply. The court said the bonds would have been good *if they had made no reference to the ordinance*, etc.; but in our case these bonds would have unquestionably been invalidated without a reference to or recital of the notice of election. At least, there must have been a recital of compliance with the statute, which could have been held *ex vi termini* to import and certify that there was a recorded notice of election setting forth all the essential and jurisdictional facts which we contend show the want of jurisdiction and flagrant departure from the statute in attempting to refund private debts. All the case decided was that the recitals could not be contradicted *as to the purpose for* which the bonds were issued, where there was no requirement that such purpose should appear on the face of the proceedings. If the statute in Hackett *vs.* Ottawa, instead of giving a general power and jurisdiction, had provided that an ordinance

might be passed specifying the *purpose*, etc., and then that the bonds specified in the ordinance might be sold, etc., the case would have been something like this, instead of being, as it is, its very antithesis, and under such a statute it must have been differently decided or overruled by the subsequent line of cases like Dixon *vs.* Field and the Sutliff case.

Risley *vs.* Village of Howell, 64 Fed., 453; 57 Fed., 544, is subject to the same explanation. It follows and is professedly based upon Hackett *vs.* Ottawa, from which it is said not to be distinguishable. In both cases all that is decided is that the mere circumstances that an ordinance sets forth facts showing an unlawful *purpose*, when there was no statutory requirement that it should say anything on the subject, does not, when recited, impose on the purchaser the duty of examining something the statute gave him no warning would afford him any material or reliable information. By the statute and recitals in Risley *vs.* Howell the purchaser *(that court thought)* had a right to conclude that the bond had been properly issued and sold in strict accordance with law, and that with the purpose or act of the municipal officers in the subsequent disposition of the proceeds of the sale he had no concern. In other words, that he was not bound to see to the application of the purchase-money. The pertinent thing in this case of Risley *vs.* Howell is the reference to the Sutliff case, which shows how the case would have been decided had the Michigan statute resembled ours. The reference then would have read:

"The case of Sutliff *vs.* Lake Co., 149 U. S., 230, is a case "of the same character as the one before us. The bonds "in suit were part of an issue in excess and violation "and utter disregard of the power and jurisdiction pre- "scribed by the statutes; and, as the public records, to "which the purchaser had access, disclosed the lack of "power, he is bound by the facts disclosed by them, not- "withstanding the recital in the bonds that they were "issued in conformity with the statute."

Another case cited on this point is Evansvills *vs.* Dennett, 161 U. S., 434. Much that we have said applies to this case. In addition, we may say confidently that it was not intended to overrule or in any way or degree detract from Dixon *vs.* Field, the Sutliff and like cases. If there had been any such thought, those cases would certainly have been at least alluded to, especially as they have been so often, before and since, mentioned and treated as embodying the settled doctrines of the Supreme Court. Evansville *vs.* Dennett is one of a class of cases in which a town, city, or other municipality has power to issue bonds under a certain charter or statute, and also erroneously claims and asserts power to issue them under some other statute. In such cases it is held that the recitals that the bonds are issued under the statute which does not, in fact, give the power, do not invalidate the bonds if there was some other power, charter, or statute under which they might properly have been issued. Thus, in Evansville *vs.* Dennett there was power under the charter to issue the bonds on a peti-

tion of voters or taxpayers presented to the council. There was also a statute allowing the bonds to be issued pursuant to a vote previously had. The statute, in fact, as it turned out, was not operative, as having been repealed or for some other reason. The council, however, passed a resolution declaring that the bonds were issued under the statute and upon a vote, as the ordinance or resolution did not purport to show, and did not show, that any petition had been presented, and in fact none was presented. The question presented to the Supreme Court was whether a recital in the bonds that they were issued pursuant to an ordinance affected purchasers with notice of the terms of the ordinance and imposed upon them the duty of examining the ordinance. It was held that it did not, and that the purchasers had a right to act upon the supposition that the ordinance conformed to the charter, the only valid statute conferring power to issue the bonds, and that therefore the requisite petition had been presented.

Now, evidently this is simply following Hackett *vs.* Ottawa. There was nothing in the statute or in any of the statutes requiring the petition to state the jurisdictional facts and making such statement a matter of record, public or otherwise. Whether the petition was presented and whether it was a proper petition was left a matter *in pais*, and there was no requirement that any ordinance or resolution should in any way refer to it or make it a matter of record. The decision that the recital implied and assured the purchaser that the ordinance

complied with the statute, in the very nature of the case, could only be a decision that the ordinance contained everything that the statute required it to contain. It certainly did not and could not decide that if the statute had expressly required that the ordinance should recite the petition, the recital would imply that it did not recite it. It may be that the recital implied and even proved that the petition had been presented. That would be simply because, as there was no express statutory requirement on the subject, the matter of the presentation of the petition was left *in pais* and to the determination of the officials issuing the bonds. The ordinance could fully conform to the statute and to every requirement of law and still be utterly silent as to the presentation of the petition. It was the Hackett case over again—simply that the gratuitous and unnecessary statement of a fact in an ordinance did not make the recital of that ordinance notice to the purchaser of the fact. The case must stand just as it would have stood if the ordinance had in all respects complied with the statute, and had not, without any requirement of the statute compelling it, stated any matters showing non-compliance with the law. In the case we are discussing, for instance, the ordinance stated erroneously and mistakenly that the proceedings were held under an invalid statute, and did not state a compliance with the charter; but there was no statutory requirement that the ordinance should say anything about either. The case is the same as if a council having perfect authority to issue

bonds under a valid statute should foolishly and mistakenly and unnecessarily pass an ordinance reciting the provisions of an invalid statute, and that they were proceeding under that, and then issue the bonds, with proper recitals that they were issued in conformity to the law and also in pursuance of ordinances, the general recital would control, according to Evansville *vs* Dennett.

The language of the court in Evansville *vs.* Dennett, 161 U. S., 443, 444, clearly shows that we have correctly interpreted that case, and plainly distinguishes it from ours and such cases as Dixon *vs.* Field and the Sutliff case, which are not mentioned or referred to, as they certainly would have been had the statute of Indiana been anything like ours. This, we submit, is self-evident unless some reasonable and sensible distinction can be drawn between a statutory requirement of a public record accessible to *all* and contained in legible, well-bound books kept by the city itself and any other public record like that of assessed valuation, registry of voters, etc., passed upon in the cases relied upon by petitioner, and even such a distinction would not reach the record in the Sutliff case; but there is no such distinction. *All the reasons* given apply equally to any "express and definite "record of a public character." As appears from the language above referred to (161 U. S., 443, 444), there were two statutes—one invalid, providing for an election; the other, the charter, valid, but requiring a condition *in pais*, nowhere required to be recited or embodied

in any record of any kind or nature, to wit, a petition of two-thirds of the resident freeholders. The court thought that the question whether there was a petition, whether it was signed by the requisite freeholders, etc., like other conditions *in pais*, was *intended by the legislature* to be left to the determination of the officials; that it was not necessary or required by the statute that such determination should appear of record or by ordinance or otherwise than by a recital in the bonds; that a mere recital of compliance with the charter concluded the question, and that, though there was an unnecessary and superfluous recital of an ordinance, the purchaser had a right to assume, even if he had seen the ordinance, that the election under the invalid statutes was a harmless surplusage, and that, as recited, both methods were pursued, and both the valid and invalid statutes complied with. The ordinance did *not* show, as does the notice of election in the case at bar, *affirmatively* a want of jurisdiction or abuse of power. It merely *failed* to show or make matter of record a fact which no statute required the ordinance even to allude to, and which the statute did no contemplate the entering of upon any record. According to the views of the court, the bonds would have been equally good if the ordinance had been equally silent as to the petition and the election, and the recital had simply been a compliance with the charter, omitting all reference to the invalid statute and the ordinance. This was merely following the Hackett case. The holding that the recital imported that the ordinance

was in conformity with the statute is entirely consistent with the doctrine of Dixon *vs.* Field, the Sutliff case, and like cases. In those cases an express recital that the records in question existed and fully conformed to the statute requiring and providing for them would not have varied or influenced the result except by furnishing an additional ground for the same decision. If the express recital in the case at bar of the notice of election imports its conformity with the statute prescribing its contents, it thereby imports that the record thereof absolutely furnished the exhaustive and conclusive proof of the power of the officials in regard to issuing the bonds and the sole test of the regularity of its exercise. It does not present a case like Evansville *vs.* Dennett, where, notwithstanding the ordinance recited fails to show the power and jurisdiction affirmatively, there was still another source of power not alluded to in the ordinance under which the proceedings might have been regular, and which did not require the facts calling it into existence and justifying the action taken to be specially or otherwise recited and spread on the records. What would have been the answers to the questions in Evansville *vs.* Dennett, even under the Indiana statute and the Indiana decisions and jurisprudence relied on and followed, if the ordinance had shown affirmatively a lack of power and jurisdiction under both the statute and the charter, we need not consider further. We think nothing special need be said concerning the other decisions relied upon by petitioner, because we submit what we

have already advanced applies to and covers them all. In so far as they agree and follow the decisions of the Supreme Court, it certainly does; and if there be any inconsistent therewith, which we think there are not, they are not authority here.

National Bank *vs.* Board, 62 Fed., 789, is fully in line with our contention and well illustrates the difference between this case and all those cited against that contention.

The law always has some reference to common sense and the actual transaction of affairs. No man in his senses would or could in good faith invest in bonds under a statute such as ours without first investigating the notice of election, ordinance, etc. No lawyer would attempt to pass the bonds without calling for these documents. He would, after the first glance at the statute, see that the only power was to sell the particular bonds detailed in the record authorized by law; and, in fact, we find the very first thing called for and examined here was this very record (Additional Finding 3, Rec., pp. 39-41; Testimony of C. D. Turney, Rec., pp. 244, 245; Testimony of F. H. Prince, Rec., pp. 246-247).

In the petition for a rehearing and for a *certiorari*, some cases not already specifically reviewed by us are relied upon as in point and conclusive of the question passed upon in the prevailing opinions in the circuit court of appeals. Counsel "call the special attention of "the court to the case of Graves *vs.* Saline County, 161 "U. S., 359," and say they consider it controlling and

decisive, etc. We respectfully submit that the case is not at all in point.

The report of the case shows that the court had in view no such question as that here presented and decided, and the opinion does not even allude to such cases as Chaffee *vs.* Potter, Sutliff *vs.* Board, and Dixon *vs.* Field. The case was decided and went off on wholly different considerations and propositions. On principles which were carefully and elaborately discussed, and which, on the theory advanced by the plaintiff in this case, there would have been no necessity or propriety of considering at all.

If the recitals in the Graves case had been deemed conclusive without regard to the invalidity of the bonds refunded or the nature of the invalidity, the whole *ratio decidendi* of the opinion would have been purely obiter and uncalled for. If the case had been similar to ours —if, for example, the bonds refunded had been forgeries or had been the bonds of some other county than the county of Saline, or of some private individual or corporation—then not one reason advanced in the opinion of the court would in the slightest degree have tended to justify the conclusion reached.

What was decided was that of the bonds refunded, the St. Louis and Southeastern bonds were valid *ab initio* and without any aid from the recitals in the new bonds. As to the Bellville bonds, it was held that though originally invalid, the invalidity depended upon and grew out of a failure to comply with certain conditions, those conditions were not necessarily imposed; and as the

county had the power to issue the bonds unconditionally, it could afterwards waive a compliance with them. And the fair inference from the opinion is that if the statute authorizing the issue of the Bellville bonds had required the imposition of the conditions, then compliance with the conditions could not have been so waived and the decision would have been different.

This Court said: "It may be admitted that * * "where the right to exercise the power has been sub- "jected to conditions prescribed by the legislature, the "municipality cannot dispense with or waive such con- "ditions." So, in our case, the recitals in the refunding bonds cannot be treated as ratification of validation of the bonds refunded or as an estoppel to deny their validity, because, as said in the opinion quoted from, the city could not ratify a contract into which it had no power to enter, or dispense with the condition imposed by the statute expressly confining its power to the refunding of indebtedness evidenced by its own bonds.

As to the statutes of Illinois requiring the description of the bonds to be entered, it does not appear by the report to have been complied with; and if it had, this Court expressly declined to decide any such questions by the statement that no formal answer to the question certified, viz: whether the county was estopped by the recitals in the funding bonds to assert that the bonds refunded were not binding obligations. It is claimed in the petition for a rehearing that the Gunnison case, 173 U. S., 255, is *exactly in point and controlling.* That case

was not relied on in the circuit court or in the circuit court of appeals, we suppose, because neither the court or the then counsel supposed it varied the law as previously laid down. And we submit they were justified in so considering it. This Court evidently did not consider that it was in that case enunciationg any new doctrine; and we submit that all it did in deciding that case was to hold that while fully adhearing to Dixon *vs.* Field and the Sutliff case, as well as to Chaffee *vs.* Potter, the Gunnison case was ruled by the former instead of the latter. Very likely, in the plentitude of their zeal and ability, the respective counsel in the Gunnison case advanced many arguments and took many positions *pro* and *con*, which, if necessarily involved and actually *decided*, might have a bearing on the question here involved. But the decision and necessary ratio of the Gunnison case adds nothing whatever to the argument which might as well have been made in this case had the Gunnison case never arisen. The contention in the Gunnison case was that the bonds were invalid in the hands of *bona fide* holders because the indebtedness to fund which they had been issued was in excess of a *constitutional* limitation. Counsel say in their petition that it was argued in the Gunnison case that an examination of the records would have shown a certificate of the county commissioners stating the amount of indebtedness of the county and showing that it was beyond the constitutional limit presented by the constitution and statutes of the State. We do not gather from the re-

port of the case that there was or could have been any valid contention that the certificate would have shown any violation of the *statute*. It is true that the statute provided that the amount of bonds issued should not exceed the amount of the county indebtedness at the date of the first publication of the notice, *and that the amount should be determined by the commissioners, and a certificate made of the same and put on record.* But, as shown in the opinion of the circuit court of appeals, even if a purchaser were held to knowledge of this certificate, there was nothing in it to inform him that the *statute* had been violated. If the record in the Gunnison case had shown that the issue exceeded the sum of the county indebtedness at the date of the first publication as shown by the certificate, and that each bond disclosed the amount of the whole issue, the decision made would not have been made without an explicit statement to that effect. Such a decision would have directly and palpably overruled the Sutliff case, which was by the strongest implication recognized in the opinion rendered. The pith and point of the decision of this Court in the Gunnison case is found in the declaration that the Court declines to overrule Chaffee *vs.* Potter, and while equally affirming the Sutliff case and Dixon *vs.* Field, holds that the Gunnison case is ruled by the former.

In Chaffee *vs.* Potter, as in the Gunnison case, the point decided was as to the *constitutional* and not the statutory limitation. Certainly, if in the case of Chaffee *vs.* Potter the point had been made and sustained by the record

there, the certificate of indebtedness made and spread on the records in obedience to the provisions of the statute under which the bonds were issued, showed that the issue was in direct contravention of the statute declaring such excessive issue null and void (142 U. S., p. 360), the decision must, on the very principles laid down in the opinion of Justice Lamar, have been the other way. In other words, it was not decided or intimated that the purchaser must not look to the records, but simply that, even if he did look to them, they would not in that case have notified him of the invalidity of the issue. If each bond in Chaffee *vs.* Potter had, as in Lake *vs.* Graham, disclosed the amount of the whole issue, the purchaser would have been defeated if an examination of the assessment roll, with the bond, would have disclosed the invalidity. And by a perfect parity of reasoning, if the certificate of record be substituted for the assessment roll, the result must be the same. If any distinction, however refined, can be here drawn, it must be based on the fact that the Colorado statute *in express terms* submitted the determination of the amount of indebtedness to the commissioners. But the same statute in the same terms required that determination to be spread on the records; and, what is more to the purpose here, the California statute confers no such express power of determination upon the city officials.

The opinion of the circuit court of appeals in the Gunnison case clearly shows that, so far as the question now in view is concerned, that case could well have been

decided, as it was decided, without in the slightest degree conflicting with the position taken by the circuit court of appeals in our case.

And, except with reference to the question of *bona fide* purchase, the opinion of the circuit court of appeals in the Gunnison case stands well and in perfect harmony and consistency with the opinion in this Court in that case.

When this Court said that the rulings of the circuit court on evidence and in its charge were inconsistent with the principles of its opinion, it but reiterated what the circuit court of appeals had said in its opinion, and an all sufficient reason for reversing the judgment of the circuit court of appeals is found in the difference of view concerning the five bonds taken in exchange for warrants.

We beg leave to repeat that in order to make the Gunnison case authority for this case, we must assume that something is there decided which would be applicable if, in that case, each bond had shown on its face the total issue and the certificate of indebtedness compared with any one bond would have demonstrated the invalidity of the issue—a proposition which, we submit, was not within the contemplation of the Court and is not sustained by anything in the reasoning of the opinion. It is quoted in the petition from that opinion that the principles announced by no means render it impossible to guard against excessive municipal indebtedness, because the State "may prescribe a definite rule or test for

determining whether the limit has been exceeded." Now, if a statute like that of Colorado involved in the Gunnison case takes pains to say that the issue shall not exceed the amount of the county indebtedness at a given time, and that a certificate of such amount shall be made and put on record, and that any issue in excess of the sum so appearing of record shall be null and void, would any one say that the suggestion of this Court had not been adopted? If that is not prescribing a definite rule or test for determining whether the limit has been exceeded, what would constitute such a rule or test? Hence, too, we submit, this Court did not, in this respect, overrule the circuit court of appeals in the Gunnison case, or intend to say that if taking each bond and comparing it with such a certificate, the recital is contradicted, the recital must prevail. Why should it? The statute tells the intending purchaser that the test has been provided and is to be found of record. What matters it whether that record or that test is a certificate or an assessment or any other public authentic memorial accessible, and easily accessible, to all? It is not necessary that the State, in protecting her citizens, shall go so far as to destroy all the negotiable qualities of the bonds. She should be allowed to protect both the citizen and the purchaser—the latter by cutting off all defenses *in pais*, but still requiring him to examine the specific records provided for in the very statutes and laws which confer the authority to issue the bonds and at the same time prescribe not only the limitations of that

authority but also the definite test by which their observance may be determined. In Geer *vs.* School District, 97 Fed., 732, it is held that bonds reciting compliance with all the requirements of a statute limiting the issue to a certain percentage of the assessed value of the property of the municipality were invalid in the hands of a *bona fide* holder where the limit was exceeded; that is, where the record or test prescribed contradicted the recital. It was held that the case was ruled by Dixon *vs.* Field, Lake *vs.* Graham, and Sutliff *vs.* Commissioners, rather than by Chaffee *vs.* Potter or the Gunnison case. There, as here, if that be the test, the statute did not expressly commit the determination to the officials issuing the bonds. The recitals there were equivalent to those here; for a recital that the statute has been complied with cannot be made any better or more efficacious by any repetition or detail. And, in fact, the specification in the recital in our case so much relied on is not apt for the purpose intended. The notice of election had specified the bonds of a private corporation and declared them to be part of the bonded indebtedness of the city *because* they were a lien on city property. This *non-sequitur* is carried into the recital, which does not follow the statute and say "indebtedness evidenced by bonds of the city," but simply "bonded indebtedness of the city."

It is not a recital of facts constituting compliance with the statute, but, at best, a conclusion or opinion.

So, in another recent case, since the Gunnison case, it

is held that the doctrine of Dixon *vs.* Field and the Sutliff case is unaffected by that of Chaffee *vs.* Potter, and consequently by the Gunnison case, and that notwithstanding the recitals the municipality is not concluded as to any facts expressly required by statute to be made a matter of public record open to the inspection of every one.

National Life, etc., Co. *vs.* Mead, 82 N. W., 80; (S. C.) 83 N. W., 335.

According to that ruling there is nothing in the Gunnison case conflicting with the opinion of Judges Ross and Hawley, because the fact of the character of the bonds refunded was one as to which the city could not be concluded by any recitals, for the same reasons that it could not in the case cited be estopped as to the amount of the existing indebtedness.

Purchasers were bound to know by what authority the mayor and city clerk executed the bonds, and who was mayor. As the statute gave no such authority, they were bound to examine ordinances and records showing authority and official character of officers, and therefore had notice of invalidity of the bonds as shown by such ordinances and records.

But there is another insuperable objection to any recovery on these bonds, in dealing with which we are driven to no weighing or analysis of authorities, and

which can be overcome, we submit, only by a disregard of the most elementary principles, as to which there is no semblance of conflict.

Recitals or no recitals, and without regard to their character, the purchaser is by law, and without regard to the fact of ignorance or knowledge, *held* to know the official character of the signers and issuers of the bond. Before the recitals can have any force the authority to make them must be shown otherwise than by the recitals themselves. (See Bissell *vs.* Township of Spring Valley, 110 U. S., 162.)

We also beg leave to call particular attention to the late and well considered case of Browser *vs.* Bon Homme, 46 N. W., 173, cited by Simonton, sec. 45, p. 53, where the statute, like ours, did not itself confer any authority to sign, etc., upon the particular officials (e. g., the mayor or clerk), and where, as in our case, it therefore was necessary for the purchaser to satisfy himself by the records. In all such cases of *special* power to sell or issue certain bonds, this duty becomes more imperative. But it exists in *all* cases where the statute calls the attention of the purchaser to a record. As, if the record referred to be the vote cast at a preceding general election, all purchasers are bound to take notice of what that record discloses. For the facts disclosed by such a record, whether they consist of the number of votes or the particularly recited bonds to be refunded or issued, "are "not dependent upon any calculation or investigation

"or weighing of facts by officers charged with the duty "of issuing bonds."

Citizens *vs.* Perry, 156 U. S., 692.

And see the cases cited in Browser *vs.* Bon Homme, from which it is made clear—if authority could be needed—that as to the official character of those signing and selling these bonds and their *power* to do what they did, no recitals could excuse or relieve the purchaser. He must act at his peril, and is held to know the facts. Purchasers of such bonds "must *take the risk* of the offi- "cial character of those who execute them."

The finding is that some of these bonds were signed by Jeter, after the election and qualification of his successor. The finding, therefore, is that when he signed them he was not the *de jure* mayor of the city. Of this the law imputes notice. Of this the purchaser takes all the risk. He is held to have examined the records to this extent, whether he did or did not. For only by examination of the statutes and the records of the council could these facts be ascertained. The statute told him that these bonds could only be sold by the council, and when he saw one of them purporting to be signed by the mayor, it was incumbent on him to examine and inquire whether the council had acted. This took him at once to the recorded ordinance requiring the signature of a *de jure* mayor, and that necessarily took him to the records showing the election and qualification of Effey. It matters not whether by the records he could ascertain the

fact here found, viz: that Jeter signed these bonds after he had ceased to be mayor. He was bound to ascertain the fact at his peril. He certainly could have ascertained the truth with very little trouble, and by the records he would have found that Effey qualified on the very day the bonds purported to be signed, and he is presumed to have known the law placing upon him the peril, if, in fact, Effey qualified before Jeter signed. At any rate, the purchaser is bound by the result and the fact. And the fact is that before these bonds were signed Jeter had ceased to be mayor, and Effey, from the moment he qualified, was mayor, and in office, and Jeter, until he acquired some new and subsequent right or title, was a mere intruder and usurper, and had no more right to sign these bonds than had Coffin or Stanton.

State *vs.* Callaghan, 61 N. W., 1025.
Supervisors *vs.* O'Malley, 46 Wis., 64.
People *vs.* Callaghan, 83 Ill., 135.

Where it is said: "The taking of the oath * * * "was an acceptance and *user* of the office. It does not "militate against this view that defendant (e. g., Effey) "had discharged no actual duties of the office. He had "taken the oath of office that obligated him to perform "its duties when called upon to do so."

People *vs.* Board, 56 N. Y. Supp., 318.
Olson *vs.* Board, 54 P. (Kan.), 805.
State *vs.* Ivings, 36 A. (N. J.), 685.

Williams *vs.* Boynton, 47 N. Y., 426.
School District vs. Dorton, 46 S. W. (Mo.), 950.
Hand *vs.* Deady, 29 N. Y. Supp., 633.

Woods *vs.* Inhabitants of Bristol, 24 Atl., 856, a late case from Maine, in connection with which we cite as to the effect of the assignment,

McLean *vs.* Valley Co., 74 Fed., 395.

In the light of these authorities, and many others which might be cited, it is clear on the findings and the whole record in this case that purchasers were affected with knowledge that the bonds (or an indistinguishable part of them, which is all the same) were signed by an intruder and usuper, and that *when they were signed* they were mere nullities. As much so as if the signatures had been proved to be *forgeries*, or the bonds stolen before they were ever delivered. In such case, it is clear they could not be enforced; for while the Supreme Court has decided that bonds *delivered in escrow*, and put in circulation in violation of the escrow, may, *under circumstances*, be valid, the whole reasoning of the opinion and the cases relied upon and cited with approval by it demonstrates that such would not be so in the case of a forged or stolen bond.

Provident *vs.* Mercer, 170 U. S., 604-5,

which cites and approves Burson *vs.* Huntington, 21

Mich., 431, in which the true rule is expressed: When the paper has never been delivered, and therefore had no legal inception or existence, it is in law but a blank piece of paper, and the theft cannot create a valid contract on the part of the maker against his will, where none existed before.

To the same effect are the other cases, and see also City of Johnson *vs.* Charleston, 44 S. W., 674, where it is said: "This recital estopped the city, in a litigation "with innocent holders of the bonds, from denying any "recital or implied fact which the enactment made it the "duty of the city board to ascertain, determine and "certify, originally and independently of any public rec- "ord to which such holders might have had access. It "did not estop the city in such a case, however, from dis- "puting the existence of any fact which its board was "not by the enactment required to decide in the first in- "stance, or which was to be determined by some other "authority or from some record accessible to the public."

Here the record, made by the notice of the election, was the record made by the concurrent action of the council and the electors. It had to be complete before the power to sell and issue the bonds *could* come into play, and it was thus the action and determination of a different and other authority, and was expressly made the basis of the subsequent action of, it might be a different, subsequent, and newly elected council.

Then, as the purchaser knew the bonds were nullities when signed and so far as the *de jure* character of the

officials was concerned, in what way can he rely upon them? Manifestly in one way only. That is by showing that, though not *de jure*, they were *de facto* officers. The *findings of fact* do not show this. All that is found is that they continued to act publicly, without protest, and held seventeen meetings. But all this is merely evidential and does not find the ultimate fact or facts from which it necessarily follows that they were *de facto* officers. It is not found what they did, except to hold meetings, to which latter we will advert later on. From all that is found, the only thing they did might have been to perform the very act in question; and to hold that this furnished any evidence of their authority to act, would be begging the whole question.

State *ex rel* Corey *vs.* Curtis, 9 Nev., 341.

Nor does it appear—and, as we have seen, the contrary does appear or is implied—that all the parties interested did not have knowledge that they were not officers *de jure*.

Ibid., p. 339.

City of Louisville *vs.* Higdon, 2 Met. (Ky.), 528.

The statute (Stats. Cal., 1875-6, sec. 7, p. 192) shows that no regular meeting of the common council was held between the 15th of April and the 7th of May, 1894, and the findings do not show that the newly elected mayor or council or any citizen had any notice or knowledge of

any of the so-called special meetings over which Jeter is found to have presided within those dates.

The findings must be sufficient *per se*, and the findings of *fact*, like a special verdict, must set forth everything necessary to justify the judgment—nothing must be left to inference, etc.

Garland *vs.* Davis, 4 How., 131.
Evans *vs.* Kister, 92 Fed., 832-3.

If we go back of the findings to the evidence, the case is still worse for the petitioner. In fact, the whole transaction was carried through in haste and under circumstances to excite suspicion rather than to lull any honest inquirer and mislead him; such an inquirer, knowing that the officials were not *de jure*, that their successors had been elected and had actually qualified, could have no excuse for purchasing these bonds. His very first step would be to ascertain whether they were really *de facto*, and up to the *time of signing* these bonds, he must have found they were nothing of the kind. In answer to this, the only argument is that they *afterwards* became *de facto officers*, and as such, ratified the act of signing the bonds and made it their own. But here is encountered another absolutely insuperable difficulty. The only evidence of ratification is found in the records of the action of the council, and they disclose on their face, beginning with the meeting of April 16th, only the doing of acts in utter violation and disregard of the statute of 1893. Certainly purchasers cannot rely

upon *such* acts, as making good that which was void in its inception. They can't say, we had a right to rely on these acts in violation of the statute as constituting the usurpers *de facto* officers, and in the same breath plead ignorance of those very acts as imparting notice that the bonds were unlawfully issued. Such a perversion of the equitable basis of the *de facto* doctrine is as novel as it is indefensible.

The *general rule* of law is that all persons dealing or contracting with municipal corporations do so at their peril, and are held to the duty of inquiring both as to the power of the city and the power and authority and official character of the agents, and of seeing to it themselves, and for themselves, that the mode of acting has been strictly followed.

Thus we find the *rule* laid down in the books, as in Dillon, for example, who says that in these cases the only safe rule of construction is the rule of strict construction. Nowhere has this rule been more fully adopted or more woven into the warp of jurisprudence and policy than in California.

In dealing with the *exception* to the rule, Dillon says, section 549, that on principle a legislative intent to invest local officers by means of a false recital with powers so tremendous ought not to be held to exist, unless it is plainly declared or implied.

But we are now dealing with a difficulty and infirmity in the case of ~~defendant in error,~~ petitioner, which is to be solved wholly by the *general* rule, and which the *exception* can-

not apply to or aid. As to this point, the case stands just as all those cases where there were no recitals stood in respect to all infirmities and defects in the proceedings. If there had been no recitals in these bonds, we suppose it is conceded, at any rate it is self-evident, that there could be no recovery. The purchaser would be held bound by the records, including the ordinances and all the proceedings. He would be bound by the real facts, however shown, and not by the distorted semblance presented in carefully cooked-up and *premeditated* (Rec., pp. 54, 55, 56) recitals. Equally *as to the official character, authority, etc.*, he is so held and bound, for, as to that, the recitals are as if they were non-existent. He is held to have known, and he must have found out in the very act of ascertaining the authority, official character, etc., of the officials, that (Rec., p. 54) in February these officials were still in office, and expecting either to be re-elected or to have time to complete the job before the 16th of April, fixed up a lot of *peculiar* recitals, by which, on the 16th of April, when the bonds were to be signed, many things were to be recited which had not yet occurred—a lot of prophetic recitals; also, that on the 16th the new officials had qualified; also, that on the same 16th, and after such qualification, the outgoing or outgone mayor signed them so as to hurry the job through. When the purchaser came to look further to find any ratification of this strange and usurping act, the first thing he would find (Rec., p. 161) was that the notice of election "fully set forth and described the

indebtedness proposed to be funded," and, by comparing the ordinance (320) with the previous ones, that the whole scheme was in part to take up and pay off a private indebtedness of nearly $100,000; and then, by the proceedings of April 16th and all the subsequent proceedings of the usurpers, he would find that each and every act which could possibly be construed into a ratification, or as constituting the actors *de facto* officers, stamped the whole transaction thus hurried through as an unmitigated fraud and perversion of the powers of the office. Can it be seriously contended that the giving away or allowing to be stolen of these bonds ratified and made good *ab initio* the wrongful and unauthorized signing of them in the first instance? Can it be held that a *de facto* holding by a usurper can be made out by one day's acts, consisting entirely of the very transaction the validity of which is in question? The very idea of *de facto* holding presupposes a reliance upon the facts constituting the holding and a wrong by being misled into acting upon their faith. It is impossible, then, that the party so relying can plead ignorance of the very thing relied on. The sum of it is, that the *recitals* cannot help the purchaser on this point, and the *facts* are fatal to his recovery.

RECITALS IN BONDS WERE MADE WITHOUT LEGAL AUTHORITY.

Neither the enabling act, nor any other statute of California, gave any power, either expressly or by implica-

tion, to the city officers to make any recitals whatever in the bonds in question; but, on the contrary, the terms of the enabling act, by express limitation, forbid the making of any such recitals, in this, that the enabling act requires the very terms of the bonds to be issued, including every detail thereof, to be prescribed and finally fixed and passed upon by the people, before the occurrence of any of the acts recited in the bonds. The language of the enabling act is as follows:

"Whenever any incorporated city or town, other than "cities of the first class, in this State, has an outstand- "ing indebtedness, evidenced by bonds and warrants "thereof, the common council, board of trustees, or other "governing body thereof, shall have power to submit to "the qualified electors of such city or town, at an elec- "tion to be held for that purpose, the question of refund- "ing such indebtedness. SAID ELECTION SHALL BE "CALLED AND HELD IN THE SAME MANNER IN WHICH "OTHER ELECTIONS ARE HELD IN SUCH CITY OR TOWN. THE "NOTICE OF SUCH ELECTION SHALL RECITE THE INDEBTED- "NESS TO BE REFUNDED, TOGETHER WITH THE DENOMINA- "TION, CHARACTER, TIME OF PAYMENT, RATE OF INTEREST, "AS WELL AS ALL OTHER DETAILS OF THE BONDS PROPOSED "TO BE ISSUED" (Stats. Cal. 1893, p. 59).

The statute therefore required the form of the refunding bond, in all of its details, to be fixed, beyond the power of the city officers to change it, in any manner, at a time when it would be impossible to make any of the

recitals contained in the bonds in question, thus necessarily and absolutely precluding the idea that such officers might lawfully make any such recitals.

The act of the legislature in thus precluding the officers of the municipality from determining any matters of fact by recitals in the bonds, is in accordance with the uniform policy of the State of California.

Const. Cal., Art. XI, Sec. 18.
McCoy *vs.* Bryant, 53 Cal., 251.
Sutro *vs.* Pettit, 74 Cal., 336.
Sutro *vs.* Rhodes, 92 Cal., 117.

All purchasers of the bonds in question had notice, by the very terms of the enabling act (Stats. 1893, p. 59), of which they were bound to take notice, that the form of the refunding bonds, including every detail thereof, must be fixed before the occurrence of any of the acts alleged to be covered by the recitals, and that the officers of the city had no power, after the election on the question of refunding, to change the details of the bonds to be issued, by reciting acts or events occurring after the passage of the ordinance submitting the question of refunding to the people of the city.

"Full control in the matter" was not given, by the statute, to the officers of the municipality in this case—indeed no control, over the question of refunding, or of estopping the city by recitals, was given to such officers—and therefore the rule contended for by petitioner, and, in support of which the case of Bernards Township

vs. Morrison, 133 U. S., 523, 527, is cited, has no application.

Bonds of the City Water Company were not bonds or warrants of the city of Santa Cruz, and that indebtedness of the City Water Company was not indebtedness of the city of Santa Cruz "evidenced by bonds and warrants "thereof."

Counsel for petitioner, in his brief on application for the writ of certiorari herein, contended that the bonds of the City Water Company (a private corporation), for the refunding of which the bonds here in question were, in part, issued, were "indebtedness of the city of Santa "Cruz evidenced by the bonds thereof," within the meaning of the enabling act.

This proposition, on behalf of petitioner, is novel and is contrary to the unchallenged findings and decision of the trial court, which held that they were not either bonds or warrants of the city and did not constitute any part of the city's "indebtedness evidenced by bonds or "warrants thereof" (Findings of Fact Nos. 3, 5 and 6, Rec., pp. 18, 19, 20; Conclusions of Law, Rec., p. 23).

These conclusions of fact and of law were acquiesced in by petitioner in the trial court, and we submit that it is too late to raise that question, for the first time, in this court, for the purpose of overturning the intermediate decision of the circuit court of appeals.

But they were not, and could not be, indebtedness, evidenced by bonds or warrants of the city of Santa Cruz,

because, as a physical fact, they did not purport to be such, and any attempt on the part of city officials, by ordinance, or otherwise, to make them such would be in direct violation of article XI, section 18, of the constitution of California, which is as follows:

"No county, city, town, township, board of education, "or school district shall incur any indebtedness or lia- "bility, in any manner, or for any purpose, exceeding in "any year the income and revenue provided for it for "such year without the assent of two-thirds of the qual- "ified electors thereof, voting at an election to be held "for that purpose, nor unless, before or at the time of "incurring such indebtedness, provision shall be made "for the collection of an annual tax sufficient to pay "the interest on such indebtedness as it falls due, and "also provision to constitute a sinking fund for the pay- "ment of the principal thereof on or before maturity, "which shall not exceed forty years from the time of "contracting the same. Any indebtedness or liability "incurred contrary to this provision shall be void."

They are not even colorable obligations of the city of Santa Cruz, and if they were, they could not be refunded under the enabling act of 1893, which expressly limits the refunding to *indebtedness "evidenced by bonds or "warrants" of the city.*

It is well settled that, in the absence of statutory authority, a municipality has no power to assume the obligations of others or to issue bonds and that bonds

issued by a municipality without such statutory or constitutional authority are absolutely void.

Wills *vs.* Supervisors, 102 U. S., 625.
Claiborne County *vs.* Brooks, 111 U. S., 400.
Concord *vs.* Robinson, 121 U. S., 165.
Kelly *vs.* Milan, 127 U. S., 139.
Brenham *vs.* German-American Bank, 144 U. S., 173.
McCoy *vs.* Bryant, 53 Cal., 241.
Sutro *vs.* Pettit, 74 Cal., 336.

The authorities cited by counsel for petitioner in support of the rule that a purchaser of land subject to mortgage who agrees to pay the obligation secured by the mortgage becomes personally liable for the obligation are manifestly irrelevant here, because they all relate to the transactions of private individuals and private corporations, and have no reference to the limitations, in this behalf, imposed upon municipal corporations by the constitutional provision above quoted.

Other Questions Involved.

The circuit court of appeals, having reached the conclusion that the judgment of the circuit court, in this case, must be reversed upon the single proposition discussed in its prevailing opinion (Rec., pp. 312-3-4-5), expressly declined to consider any of the numerous other points presented by this respondent in that court, except the question of jurisdiction, saying:

"Entertaining these views, it is not necessary to de-
" cide any other point made and argued by counsel, ex-
" cept that as to the jurisdiction of the court" (Rec., p. 315).

We respectfully submit that if, for any reason, this court should hold the views of the circuit court of appeals, upon the single question on which it reversed the judgment of the trial court, to be erroneous, the respondent herein has a right to have the other points which it presented to the circuit court of appeals, but which were not considered or decided there, heard and determined by this court.

Otherwise the respondent might be substantially deprived of its right of appeal, by having a decision erroneously rendered in its favor, on a single point, by the intermediate appellate court, reversed by this Court and the original judgment thus made final against it, without having the substance of its appeal considered or examined by either of the appellate courts.

Assuming, therefore, that this Court will, if necessary, consider the entire case, as if it had been brought here by appeal or writ of review originally, we proceed to a discussion of the other points upon which respondent, in the circuit court of appeals, sought a reversal of the judgment of the circuit court, but which points, for the reason given in the prevailing opinion of that court, were not there considered or decided.

II.

EVEN IF THE BONDS IN QUESTION WERE NOT VOID WHEREVER FOUND, YET THE CIRCUIT COURT ERRED IN RENDERING JUDGMENT AGAINST DEFENDANT UPON THE NINE BONDS AND 150 COUPONS (AMOUNTING TO $16,500) ASSIGNED BY E. G. & E. WALLACE TO PLAINTIFF, BECAUSE IT APPEARS FROM THE FINDINGS OF FACT THAT SAID E. G. & E. WALLACE HAD KNOWLEDGE AND NOTICE OF THE FACTS SHOWING AND CONSTITUTING THE INVALIDITY OF SAID BONDS AND COUPONS AT THE TIME OF PURCHASING THE SAME *(Findings Nos. 8, 12 and 13, Rec., pp. 21, 24; Additional Findings Nos. 1, 2 and 3, Rec., pp. 26 to 41, inclusive; Complaint, Rec., pp. 4 to 6; Testimony, Rec., pp. 99-101; Assignment of Error No. 30, Rec., p. 277; Error No. 31, Rec., p. 278; Error No. 35, Rec., pp. 286-7; Error No. 50, Rec., pp. 296-7; Error No. 51, Rec., p. 297; Error No. 52, Rec., pp. 297-9; Error No. 55, Rec., p. 300; Error No. 58, Rec., pp. 300-301; Error No. 59, Rec., p. 301).* Specifications supra pp 65-6, 84, 106, 108-9, 115, 117-8.

In addition to the knowledge and notice imputed to all bondholders (assignees of plaintiff herein) by the constitution and statutes by the public records (including ordinances) required by law to be kept (Rec., pp. 19-20, 26-8, 30-31, 32-34, 37-8), and by the examination of circular showing indebtedness and assessed value of taxable property (Rec., pp. 97 and 101), which circular and opinions were exhibited to nearly all purchasers of the

bonds in question, before purchasing (Rec., pp. 91 to 146), as well as to E. G. & E. Wallace (Rec., pp. 24, 39-40-41, 99-101), the said firm of E. G. & E. Wallace had full knowledge through their agents, F. H. Prince & Co. and M. F. Dickinson, of all matters contained in Ordinances Nos. 314, 315 and 320, showing the invalidity of the bonds in question (Finding No. 12, Rec., p. 24). The circuit court expressly found that E. G. & E. Wallace purchased 150 of the bonds and coupons in question from Coffin & Stanton on September 22, 1894, and that said purchase "was made by the firm "of F. H. Prince & Co., acting as agents of E. G. & E. "Wallace"; and further found that "at the time of the "sale of the refuding bonds of the defendant city to "E. G. & E. Wallace, the said F. H. Prince & Co. had no- "tice of all matters recited in the ordinances of defend- "ant numbered 314, 315 and 320" (Finding No. 12, Rec., p. 24), and the circuit court below adjudged (as we have elsewhere in this brief shown) that the said Ordinances Nos. 314, 315 and 320 show upon their face not only their own invalidity, but also the invalidity of each and all of the bonds and coupons in question (Findings Nos. 3, 5, 6, Rec., pp. 18-19; Additional Findings Nos. 1 and 2, Rec., pp. 26-8, 30, 31, 33, 34, 37-8; Conclusions of Law, Rec., p. 25). In addition to this, the circuit court found that by agreement between F. H. Prince & Co. and E. G. & E. Wallace an opinion as to the validity of the bonds in question was procured from Mr. M. F. Dickinson, an attorney-at-law, which opinion was submitted to

E. G. & E. Wallace prior to their purchase of the bonds, and that Dickinson had notice of all matters recited in said Ordinances 314, 315 and 320 (Additional Finding No. 3, Rec., pp. 39-41).

Under the general rule that notice to an accredited and admitted agent is notice to his principal, this showing would defeat the claim of E. G. & E. Wallace that they were innocent purchasers of the bonds; but the circuit court also found that F. H. Prince & Co. were the agents of Coffin & Stanton, as well as of E. G. & E. Wallace, in the transaction, and were to receive compensation from both parties thereto; that F. H. Prince & Co. did not communicate their knowledge of the ordinances to E. G. & E. Wallace; that E. G. & E. Wallace had no actual knowledge or notice of any fact tending to impeach the truth of the recitals contained in said bonds (Finding No. 12, Rec., pp. 45-6), and further found that Dickinson was the attorney of F. H. Prince & Co. and not the attorney of E. G. & E. Wallace, and did not communicate his knowledge of said ordinances to E. G & E. Wallace (Additional Finding No. 3, Rec., pp. 39-41).

The circuit court, in its opinion, after reviewing the facts above stated, says:

"To the general rule that notice to an agent while he "is engaged in transacting business for his principal, of "matters relating to such business, is notice to the prin- "cipal, there is an exception which is as well-settled as "the rule itself. The exception is, that when in the

" transaction of business entrusted to him by his princi-
" pal the agent really acts for his own benefit or for the
" benefit and advantage of the other party to the trans-
" action, notice to him is not deemed constructive notice
" to his principal (Benedict *vs.* Arnoux, 154 N. Y., 715;
" Dillaway *vs.* Butler, 135 Mass., 479; DeKay *vs.* Hacken-
" sack Water Co., 38 N. J. Eq., 158). The facts of this
" case bring it clearly within the exception stated and
" applied in the cases just cited.

" When an agent assumes to act upon account of his
" principal, and at the same time is to share in the profits
" which the other party to the contract may gain in the
" business transacted, the agent cannot be said to be act-
" ing in that matter in good faith towards his principal,
" but he is really acting for himself as well as for the
" benefit and advantage of the other party with whom he
" is to share the profits. This was the position occupied
" by Prince & Co. in the transaction by which Wallace &
" Co. became purchasers of the bonds in suit, and such
" being the case, any knowledge possessed by them, show-
" ing that some of the bonds purchased were issued for a
" purpose not authorized by law, is not to be imputed to
" Wallace & Co.

" It is further claimed by the defendant that Mr. M. F.
" Dickinson, one of the attorneys who passed upon the
" validity of the bonds, was also the agent of Wallace &
" Co. in that matter; that his opinion given to Prince &
" Co. shows that he had the ordinances under which the
" bonds were issued before him; and that the knowledge

"which he obtained therefrom must be imputed to Wal-
"lace & Co. In passing upon this contention of defend-
"ant, it will be sufficient to say that the evidence points
"to the fact that Mr. Dickinson was employed by Prince
"& Co. in the matter referred to, upon their own account,
"and not as the attorney of Wallace & Co. I do not over-
"look the fact, which is strongly urged by defendant,
"that during the negotiations Wallace & Co expressed
"themselves as not willing to rely upon the opinions of
"certain attorneys submitted to them by Prince & Co.
"concerning the validity of the bonds, and asked them
"for the opinion of Mr. Dickinson; but this circumstance
"is not inconsistent with the conclusion, which I think
"is sustained by a consideration of the entire evidence,
"that the opinion thereafter obtained from him was pro-
"cured by Prince & Co., upon their own account. The
"testimony of Sumner Wallace, of the firm of Wallace &
"Co., is that all of the legal opinions submitted to his
"firm, including that of Mr. Dickinson, were procured
"by Prince & Co., or by Coffin & Stanton. The only
"other witness giving evidence bearing upon the ques-
"tion is F. H. Prince, and he testified that Mr. Dickinson
"was employed by Prince & Co.; and there is nothing
"in his deposition from which the inference can be
"drawn that in the matter of employing Mr. Dickinson
"that firm was acting or supposed they were acting as
"agents of Wallace & Co., or that Dickinson was to be
"paid by the latter firm. Prince & Co. were directly
"interested in effecting the exchange of the Page Belting

"Company's stock for the bonds, by reason of the com-
"mission they were to receive from Wallace & Co., on
"the one side, and the profits they were to share with
"Coffin & Stanton on the other; and in view of this inter-
"est, it is not difficult to believe that after learning from
"Wallace & Co. that an opinion from Mr. Dickinson
"would be satisfactory to them, Prince & Co. may have
"obtained the opinion of that gentleman on their own
"account, so as to insure the success of the negotiations
"in which they were engaged. At any rate, the direct
"evidence of F. H. Prince is that Dickinson was em-
"ployed by Prince & Co., and for the reasons stated I
"am disposed to regard this statement as true."

It will be observed that the Circuit Court based its finding that Dickinson was the attorney of Prince & Co., and not the attorney of E. G. & E. Wallace, upon the general statement of F. H. Prince: "We employed at-
"torneys to make investigation, and to give an opinion
"as to the legality of the bonds. We employed Mr. M. F.
"Dickinson" (Rec., p. 246).

We think the Circuit Court erred in concluding that that general statement of Prince was inconsistent with and overcame the more specific testimony of Sumner Wallace as to the employment of Dickinson, namely: "We asked for the opinion of some attorney in Boston, "and decided to refer it to Mr. M. F. Dickinson" (Rec., p. 100), and "the Dickinson opinion was obtained after "by agreement, after I had said to Prince & Co. that I

"wanted an opinion from Dickinson" (Rec., p. 102). The testimony of Prince & Co., the acknowledged agent of E. G. & E. Wallace in the transaction (Finding 12, Rec., p. 24; Additional Finding No. 3, Rec., pp. 39-41), is perfectly consistent with the fact that his firm, as agents of E. G. & E. Wallace, employed Dickinson as attorney for their principals, and with the testimony of Sumner Wallace that he specifically requested Prince & Co. to procure the opinion of Dickinson, and that E. G. & E. Wallace, upon that opinion, and upon the certificate and opinion of Goldsby and Gleason, purchased the bonds (Rec., p. 100). But with this question we will deal more fully in discussing the insufficiency of the evidence to support the finding that Dickinson was the attorney of Prince & Co. and not of E. G. & E. Wallace.

We think it sufficiently appears from the findings made by the circuit court that the notice to Prince & Co. and to Dickinson of facts showing the invalidity of the bonds in question was notice to E. G. & E. Wallace.

It is an unquestioned rule of law that notice to an agent is notice to his principal concerning all matters involved in the transaction in which he acts for his principal.

Mechem on Agency, Sec. 718, and cases cited.
Story on Agency, Secs. 140, 140a, and cases cited.
2 Ram on Commercial Paper, Sec. 1003, and cases cited.

There can be no question here as to the sufficiency of

the facts communicated to Prince & Co., the agents of E. G. & E. Wallace, and by them communicated to M. F. Dickinson, Jr., the attorney employed to advise E. G. & E. Wallace as to the regularity of the issuance of the bonds in question and as to their validity.

"The rule as to what will constitute constructive notice " may be said to be, that whenever a party has knowledge " of any facts sufficient to put a prudent man upon in- " quiry, which, if prosecuted with ordinary diligence, " would lead to actual notice, he will be charged with " the knowledge that might have been acquired by such " diligence."

Mechem on Agency, Sec. 724, and cases cited.

The circuit court found that Prince & Co., as well as Dickinson, hal full knowledge (Rec., pp. 24, 41).

M. F. Dickinson, the attorney employed by F. H. Prince & Co., upon agreement with the firm of E. G. & E. Wallace, their principals, to inquire into the regularity and validity of the bond issue, and to render an opinion thereon for the guidance and protection of the firm of E. G. & E. Wallace, was equally, with Prince & Co., an agent of E. G. & E. Wallace. "The relation of attorney " and client is a relation of agency, and in its general " features is governed by the same rules which apply to " other agencies."

Mechem on Agency, Sec. 987.

If Mr. Dickinson was not the attorney of E. G. & E. Wallace in the transaction, then he was the sub-agent of E. G. & E. Wallace, employed as such by F. H. Prince & Co., upon the express direction of the firm of E. G. & E. Wallace.

"If the sub-agent be one whom the agent was expressly "or impliedly authorized to appoint, he is deemed to be "the agent of the principal, and notice to such sub-agent "would be notice to the principal, as in the case of the "other agents."

Mechem on Agency, Sec. 728.
Story on Agency, Secs. 452, 454.
Hoover *vs.* Wise, 91 U. S., 310.
Storrs *vs.* City of Utica, 17 N. Y., 104.
Boyd *vs.* Vandenberg, 1 Barb. Ch., 273.
Rourke *vs.* Story, 4 E. D. Smith, 54.
Lincoln *vs.* Battle, 6 Wend. (N. Y.), 475.

We submit that, upon the face of the record, it appears that the circuit court erred in holding that notice to F. H. Prince & Co., the agents of E. G. & E. Wallace, was not notice to their principals, because said Prince & Co. were to receive a commission from Coffin & Stanton in the same transaction.

In deciding this question, the circuit court went a long step beyond anything decided in any of the cases cited and relied upon in the opinion, or any of the cases on this subject. The circuit court seems to have held that the

mere fact that the agent of a party may also be the agent of the other party, and may have some expectation of compensation from that other party in case the transaction be completed, alone, and in, and of itself, prevents the imputation of his knowledge to either principal.

We submit that this is going too far, and that the cases relied upon, when fairly construed, at most only go to the extent that where the agent, although such, is not really and *pro hac vice* an agent, or where the agent is himself engaged in or privy to a fraud to be committed upon his principal, in such cases his knowledge is not to be imputed.

The facts of our case plainly fail to bring it within any of the cases referred to by the circuit court. There can be no pretense that Prince & Co. were attempting to defraud their principals, or that they thought they were being guilty of any wrong doing. No reason is suggested from the findings or from the testimony why they would not willingly have communicated any knowledge they had to their principals, or, rather, why they should have intentionally and purposely endeavored to conceal it from them. They did communicate the very knowledge in question, and vitally material here, to the principal Dickinson, and there can be no presumption that there was any collusion between them and Dickinson, and there can be no reason founded upon any of the cases why the knowledge of Dickinson should not be imputed.

The mere fact that Prince & Co. were agents for both Coffin & Stanton and E. G. & E. Wallace in the transac-

tion in question is not enough to defeat the presumption that an agent communicates his knowledge concerning the subject of the agency to his principal.

Witter *vs.* McCarthy (Cal.), 43 Pac., 969.

There is a late United States Supreme Court case which reviews the same authorities cited and relied upon by Judge De Haven and many others. The *ratio decidendi* is that where the agent acts for both sides *and is* guilty of a fraud, or is attempting a fraud against one principal, that principal is not to have imputed to him the knowledge of the agent, and some of the cases seem to put it on the ground that under the circumstances it is *conclusively* shown, or at least palpably, that the agent would not have communicated the fact to the principal —a very different proposition from that formulated by the circuit court below (See Rec., p. 53).

American Surety Co. *vs.* Pauly, 170 U. S., pp. 149-159.

It will be noted that the American cases are based upon, and profess to follow, the rule as laid down by the English cases. One of these English cases, Badley *vs.* Riches, 9 Ch. Div., p. 189, is a very strong case, and seems to us conclusive against the reasoning and holding of Judge De Haven. The syllabus reads:

"The presumption that a solicitor has communicated "to his client facts which ought to have been made

"known, cannot be rebutted by proof that it was to the "solicitor's interest to conceal the facts."

The court said, p. 196: "It is said that Riches, the "agent, had an interest not to communicate, because it "is possible that the transaction might have gone off, "and he then would not have obtained the benefit which "he did by that mortgage; but I will not lay down as a "rule that where a solicitor owes a duty on the one side "and has an interest on the other side, the presumption "arises that he follows his interest and not his duty. I "shall, on the contrary, presume that in this case he per- "formed his duty, even although it was against his in- "interest." In Rolland *vs.* Hart, Law Reports, 6 Ch. App., 681, 683, Lord Hatherly said: "It has been held over "and over again that notice to a solicitor of a transac- "tion, and about a matter as to which it is part of his "duty to inform himself, is actual notice to the client. "Mankind would not be safe if it were held that under "such circumstances a man has not notice of that which "his agent has actual notice of. * * * It cannot be "left to the possibility or impossibility of the man who "seeks to affect you with notice, being able to prove that "your solicitor did his duty in communicating to you "that which, according to the terms of your employment "of him, was the very thing which you employed him to "ascertain. * * * " "It must be made out that a "distinct *fraud* was intended in the very transaction, so "as to make it necessary for the solicitor to conceal the "facts from his client in order to defraud him."

The notice is actual, not constructive. The notice which affects the principal does not depend upon whether it is comunicated to him or not, and therefore the presumption of non-communication is not the proper principle to apply. Rather, the commission of the fraud breaks off the relation of principal and agent, or is beyond the scope of the authority, and therefore prevents a possibility of imputing the knowledge of the agent to his principal.

Espin *vs.* Pemberton, 3 De Gex & Jones, 553.
Allen *vs.* The South Boston, 150 Mass., 206.

While in Frankel *vs.* Hudson there may be dicta going too far, the facts and the cases cited correct the error. The Kansas case cited shows the principle better and so explains Frankel *vs.* Hudson. The facts in both were that *pro hac vice* there was *no agency* at all, which brings these cases in line with the *ratio* quoted from 3 De Gex & Jones, and 150 Mass. The Missouri case, cited in the Encyclopedia, professes to follow the cases in England, Massachusetts, and Alabama, though some dicta may go further. But in our case the facts are different, and there is no presumption, certainly no clear presumption, that the agent would not communicate.

Hickman *vs.* Green, 27 S. W., 442.

In the first decision, the general rule was applied.

Hickman *vs.* Green, 22 S. W., 455.

The Wisconsin case, cited 1 Encyclopedia, p. 1145, is in favor of defendant. It follows the line of cases like those from Kansas and Alabama, where the officer was not agent *pro hac vice*, and cites cases and lays it down that if he does act as agent, although he has himself an interest, or acts in a double capacity, the general rule applies. See Loring *vs.* Broder, 134 Mass., 458, which seems in point, especially as there is no showing that Prince & Co. *supposed they were engaged in a wrongful transaction.*

In re Pilkington Bank, 58 N. W., 784.
Witter *vs.* McCarthy, 43 Pac. Rep., 969.

In the case from 65 Fed., cited in the Encyclopedia, there were two opinions, and the *ratio* of each clearly distinguishes the case from this one. That of Judge Taft is that the general rule imputing the agent's knowledge to the principal is based on his duty to communicate to the principal his knowledge respecting the subject-matter of negotiation, and the presumption that he will perform that duty. But such presumption cannot be indulged where the facts to be communicated would convict the agent of an attempt to deceive and defraud the principal.

The *ratio* of Judge Severens is that the agent had deserted his place as agent, and taken up a position opposed to his principal, and so there could be no presumption of information through a channel which was closed;

that, in fact, the party whose knowledge was sought to be imputed was not agent *pro hac vice*.

With 65 Fed. the case in 170 U. S. substantially accords.

See, also:

2 Pom. Eq. Jur., Secs. 666, *et seq.*

The law concerning notice of defects to the bondholder is well stated in Burroughs' Public Securities, thus (page 361): "The holder of a municipal bond who is "protected from the defects in their issue is one who "has no knowledge of the defects, for if he knows of "these defects, he is placed upon precisely the same foot-"ing as the original parties to the transaction. Any "defense that would be good between the maker of the "paper and the payee would be good as to subsequent "holder who had notice of the equities or defects set up "as a defense to the bonds. We have heretofore consid-"ered the question of how far the recitals in the bonds "themselves were notice to the purchaser of defects, and "the doctrine announced was that they were not only "notice of defects appearing on the face of them, but "when they put a party upon inquiry he was deemed "to have all information that, by reasonable diligence "in the prosecution of that inquiry, he could obtain. "Notice is not confined to recitals of the bonds. It is "immaterial how the purchaser gets the information "that there are defects in the issue of the bonds; it is the

"fact that he has knowledge of the defects that binds "him and puts him in the same position as the original "payee of the bond, who is bound to see that all the "conditions of issue have been fully complied with. In "City of Lexington *vs.* Butler, 14 Wall., 382, the plea, "which was a good one, sets out the facts, which showed "that the bonds had been improperly and fraudulently "put in circulation, and then averred that the plaintiff "had notice of these facts. This plea, if sustained by "proof, would have defeated the holder. In Coos Co. *vs.* "Green, 66 Mo., 498, where holder was affected with no- "tice of fraud in the issue of bonds, the bonds were di- "rected to be given up and canceled."

See:

Hopple *vs.* Wipple, 33 Ohio St., 116.
Harshman *vs.* Bates Co., 92 U. S., 569-575.
Bates *vs.* Winters, 97 U. S., 85-91.
McClure *vs.* Township Oxford, 94 U. S., 429.

In the last named case, the purchaser was presumed to know that the notice of thirty days before election had not been given. The recital informed him of the day of the election, and directed him to the law under which the bonds were issued, which, in express terms, announced to him that it did not take effect until published in a particular newspaper; and being thus put upon inquiry, it was his duty to ascertain when the law was published and did go into effect, and he will be

chargeable with such information as by reasonable diligence he could have ascertained. Chief Justice Waite remarked:

"To be a bona fide holder, one must be himself a pur-
"chaser for value without notice, or the successor of one
"who was. Every man is chargeable with notice of that
"which the law requires him to know, and of that which,
"after being put upon inquiry, he might have ascertained
"by the exercise of reasonable diligence. Every dealer
"in municipal bonds, upon which their face refer to the
"statute under which they were issued, is bound to take
"notice of the statute and of all its requirements."

McClure *vs.* Township Oxford, *supra.*
Burroughs, Public Securities, p. 331.

Notice is of two kinds—express and implied.

Express notice embraces not only what may fairly be called knowledge, from the fact that it is derived from the highest evidence to be communicated by the human sense, but also that which is communicated by direct and positive information, either written or oral, from persons who are personally cognizant of the fact communicated.

Wade on Notice, p. 5.
16 Am. & Eng. Ency. Law, "Notice," p. 790.

Implied notice is the doctrine of actual notice implied by circumstances (actual matter in the second degree).

It necessarily involves the rule that a purchaser, before buying, should clear up the doubts which apparently hang over the title by making due inquiry and investigation. If a party has knowledge of such facts as would lead a fair and prudent man, using ordinary caution, to make further inquiries, and he avoids the inquiry, he is chargeable with notice of the facts which, by ordinary diligence, he would have ascertained. He has no right to shut his eyes against the legal light before him. He does a wrong not to heed the "signs and signals" seen by him. It may be well concluded that he is avoiding notice of that which he, in reality, believes or knows. Actual notice of facts, which, to the mind of a prudent man, indicate notice, is proof of notice.

Krepp *vs.* Bailey, 79 Me., 195.

The Courts, following the dictates of public policy and positive law, hold that municipal bonds issued for a private purpose are void.

Call *vs.* La Grange, 113 U. S., 1.
Simonton, Bonds, Sec. 33, Sec. 39, Sec. 40, Sec. 41.
Cooley, Taxation, Chapter IV.
Cal. Constitution, Sec. 31, Art. IV.
Simonton, Bonds, Secs. 150-151.

Notice to agents is notice to principal.

The notice given by the statutes or ordinances under which a bond was issued binds principals directly, or

binds them indirectly through their agents. An agent is one who represents another, called a principal, in dealing with a third person, and such representation is called agency.

Cal. Civil Code, Sec. 2295.

An agency may be either actual or ostensible. It is actual when the agent is really employed by the principal. It is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him.

Cal. Civil Code, Secs. 2298-2300.

By keeping the fruits of an unauthorized act of his agent, the principal ratifies the act and makes it his own.

Cal. Civil Code, Sec. 2310.

It is the rule that the knowledge of the agent is the knowledge of his principal, and that notice to an agent within the scope of his agency is notice to the principal.

Cal. Civil Code, Sec. 2332.
1 Wait's Act. Def., 231.
Bennett *vs.* Buchan, 76 N. Y., 386.
Jackson *vs.* Laflin, 103 U. S., 800.
Smith *vs.* Ayer, 103 U. S., 320.

The Courts of California have applied the rule that notice to agent binds the principal in the case of an unrecorded prior mortgage.

In Donald *vs.* Belas, 57 Cal., 399, it was held that if an agent, at the time of effecting a purchase, have knowledge of an unrecorded mortgage, his principal is affected thereby. In this case, everything in connection with the mortgage itself and the abstract which he got from the attorney, and upon the face of which he claims to have purchased, put him upon inquiry. They notified him of something beyond. It was such notice as would have led any honest man, using ordinary caution, to make further inquiry before purchasing. Notice of any fact calculated to put him on inquiry is, in the absence of explanation by him, sufficient to charge him with notice of all instruments and facts in connection with them which an inquiry would have disclosed. The rule is thus stated by Belden, J., in *Williamson* vs. *Brown*, 15 N. Y., 363: "That when a purchaser has knowledge of any fact "sufficient to put him on inquiry as to the existence of "some right or title in conflict with what he is about to "purchase, he is presumed either to have made the in-"quiry and ascertained the extent of such prior right, or "to have been guilty of a degree of negligence equally "fatal to his claim to be considered as a bona fide pur-"chaser." Besides, the attorney who prepared the abstract acted as such for both assignor and assignee. He had acquired a knowledge of the fact of the priority of

the registration of the plaintiff's mortgage. * . . * * Acting as he did, in the capacity as attorney or searcher for both the assignor and the assignee, it was his duty to make his knowledge known to the assignee. The knowledge of an attorney is the imputed knowledge of his client. It is the well settled doctrine of English law that if the agent, at the time of effecting a purchase, have knowledge of any prior lien, trust or fraud affecting the property, no matter when he acquired such knowledge, his principal is affected thereby. "The general rule," said Mr. Justice Bradley, in the Distilled Spirits Case, 11 Wall., 367, "that a principal is bound by the know-"ledge of his agent is based upon the principle of law "that it is the agent's duty to communicate to his prin-"cipal the knowledge which he has respecting the sub-"ject-matter of negotiation, and the presumption that "he will perform that duty."

In a leading case it was held:

"Notice of equities of an infirmity of title to an attor-"ney, counsel, or agent, acquired during negotiations "for a purchase is constructive notice to the client or "principal, and such constructive notice is conclusive "and irrebutable; and if an unrecorded deed under "which the client must rely for the title purchased is "shown to his attorney, he is chargeable with notice of "marks of infirmity appearing upon the face of said "deed, and is bound by its legal effect, regardless of the "error of the attorney in misinterpreting the instru-

"ment, or of his neglect to inform his client of such in-
"firmity. It appears, and is found as a fact, that Sutro
"had no actual knowledge of any of the foregoing facts
"on which the question of notice turns. The only notice
"which he had was that which the law attributes to him
"from its having been brought to the knowledge of his
"attorneys. Knowledge by notice to attorney, or coun-
"sel, or agent acquired during the negotiations for a
"purchase is constructive notice to their principal. If
"it were otherwise it would cause great inconvenience,
"and notice would be avoided in every case by employ-
"ing agents (see cases cited in 2 Lead. Cas. Eq., pt. 1, pp
"133, 134). That notice to an agent is notice to the
"principal, has been held in this State ever since Con-
"nolly *vs.* Peck, decided in 1856, and reported in 6 Cal.,
"348; followed in May *vs.* Morrell, 12 Cal., 91; Stanley
"*vs.* Green, 12 Cal., 148; Hunter *vs.* Watson, 12 Cal.,
"363. Notice to counsel or attorney is constructive no-
"tice to client Bierce *vs.* Red Bluff Co., 31 Cal., 161,
"and Donald *vs.* Beals, 57 Cal., 399). All these cases in
"regard to an agent apply to an attorney or counsel, for
"they are a species of agent. Justice Bradley, in the
"Distilled Spirits Case, 11 Wall., 367, states the princi-
"ple on which the rule rests. * * * It will be of no
"avail to the purchaser that the agent omitted to com-
"municate what he ascertained to his principal (Wil-
"liamson *vs.* Brown, 15 N. Y., 359). In other words,
"one who acts through another will be presumed to

"know all that the agent learns during the transaction, "whether it is actually communicated to him or not. "There is no difference in this respect between actual "and constructive notice; for if there were, an agent "would be employed whenever it was convenient to re- "main in ignorance" (Bank of United States *vs.* Davis, 2 Hill, 451-461). Or, as the reason of the rule was stated by Lord Brougham: "Policy and the safety of the pub- "lic forbid a man to deny knowledge while he is so deal- "ing as to keep himself ignorant, or so that he may keep "himself ignorant, and yet all the while let his agent "know and himself profit by that knowledge" (Ken- "nedy *vs. Green*, 3 Mylne & K., 699-719). It is plain that the ordinary dealings of men could not be carried on without imperiling the rights of property to a degree which could hardly be conceived, and infinite wrong done to innocent persons, unless the rules above pointed out were established canons of law. In this case, as the record shows, there can be no pretense that Wallace & Co. did not know that Prince & Co. were acting for Coffin & Stanton; and consequently any possible relaxation of the rule of imputed notice and any exception to the operation of that rule which can be suggested as growing out of the dual nature of the agency, can have no force or application.

Pine Mountain Co. *vs.* Bailey, 94 Fed., p. 260, etc.

The Circuit Court erred in finding that M. F. Dickinson was the attorney of Prince & Co., and not the attorney of E. G. & E. Wallace, and in refusing to find that said Dickinson was the attorney of E. G. & E. Wallace, employed for them, upon their express direction, by their agents, Prince & Co. (Specifications of Error, supra. Assignments of Error, No. 23, Rec., pp. 269-272; No. 29, Rec., pp. 275-77, No. 30, Rec., p. 277; No. 31, Rec., pp. 518-19. Exceptions, Rec., pp. 253, 254-7, 257. Findings, Rec., pp. 24, 39-41).

That the circuit court erred in refusing to make the additional finding of fact requested by defendant, and set forth in specification of error, is, we think, sufficiently shown by the testimony cited and quoted in said specification. The circuit court, in refusing to make the finding requested, as set forth in said specification, made additonal finding number 3 (Rec., pp. 39-41, Specifications of error), covering much of the same matter, but differing from the finding requested essentially in the following particulars:

1. In said additional finding number 3, the Court, referring to the employment of M. F. Dickinson, Jr., an attorney-at-law, practicing in the city of Boston, to make an investigation or examination concerning the validity of the refunding bonds afterwards purchased by E. G. and E. Wallace, says: "F. H. Prince & Com-"pany thereupon suggested that the opinion of M. F.

"Dickinson, Jr., an attorney practicing in that city, "should be obtained. This suggestion was satisfactory "to E. G. and E. Wallace, and it was then agreed be- "tween F. H. Prince & Company, and E. G. and E. "Wallace, that the opinion of said Dickinson upon the "question of the validity of said bonds should be ob- "tained by F. H. Prince & Company" (Rec., pp. 39-40). This portion of the additional finding makes it appear that F. H. Prince & Company suggested the employment of Dickinson to make the investigation and render the opinion, and that E. G. and E. Wallace simply assented to the suggestion of Prince & Company, whereas the testimony of Mr. Sumner Wallace, who represented the firm of E. G. and E. Wallace, in the negotiations which resulted in the purchase of the bonds assigned by them to plaintiff for collection was, "We "(referring to his firm) asked for the opinion of some "attorney in Boston, and decided to refer it to Mr. M. "F. Dickinson, Jr., attorney for the American Loan & "Trust Company, and his opinion was obtained, which "I have here. Those opinions being favorable, I pur- "chased the bonds" (Rec., p. 100).

Further testifying, Sumner Wallace said: "The "Goldsby and Gleason opinions were submitted to us "without consultation with us, but the Dickinson opin- "ion was obtained after, by agreement, after I had said "to Prince & Company that I wanted an opinion from "Dickinson" (Rec., p. 102).

The finding on that subject requested by defendant

(plaintiff in error here) was as it appears to us conservative and well within the proof. That the variance between the evidence and finding on this proposition is material is sufficiently evidenced by the conclusion of the circuit court; that the circumstances under which Mr. Dickinson was employed to make the investigation and render the opinion afterwards relied upon by E. G. and E. Wallace in purchasing the bonds, made him the attorney of F. H. Prince & Co., and not the attorney or representative of E. G. and E. Wallace.

2. Further, in said additional finding number 3, the circuit court finds: "F. H. Prince & Company then, on "their own account, and for themselves, and not acting "as agents of E. G. & E. Wallace, employed said Dick- "inson to give his opinion in relation to the validity of "such bonds" (Rec., p. 40). We submit that this very material finding that F. H. Prince & Company employed Dickinson "on their own account, and for them- "selves, and not acting as agent of E. G. and E. Wal- "lace," whether it be regarded as a conclusion of law or as a finding of the ultimate fact, is erroneous, is contrary to the testimony of Sumner Wallace, above cited, is not supported by any other evidence, and we submit that there is no evidence contrary to or inconsistent with the testimony of Sumner Wallace, above cited upon the proposition involved in said portion of said additional finding number 3.

We therefore submit that the circuit court erred in

refusing to make the amendment to finding number 12, requested by defendant, and also erred in making said additional finding number 3, which we assert is contrary in the particulars above stated to all of the evidence in the case upon the questions or issues involved in said portions of said additional finding number 3.

III

THE SO-CALLED REFUNDING ACT UNDER WHICH SAID BONDS AND COUPONS WERE ISSUED IS UNCONSTITUTIONAL *(Error No. 1, Rec., p. 260; Error No. 34, pp. 285-6; Error No. 49, p. 292; Error No. 51, p. 297; Error No. 59, p. 301).* Specifications. Supra pp 41, 81, 91, 108, 118.

The entire refunding bond issue, including the bonds and coupons here in question, was void, because the statute of March 1, 1893 (Stats. Cal., 1893, pp. 59-60), authorizing cities in the State of California, other than cities of the first class, to refund their outstanding indebtedness, evidenced by bonds and warrants thereof, is unconstitutional in the following particulars:

1. Because it is a local and special law, relating to a subject concerning which the constitution, article IV, section 25, requires all laws to be general.

2. It provides for the impairment of the obligations of then existing contracts, contrary to the provisions of Article I, Section 16, of the Constitution of California, providing, "No * * * law impairing the obliga-

"tion of contracts shall ever be passed." It also violates the corresponding provision of the Federal constitution: "No State shall * * * pass any * * * "law impairing the obligation of contracts" (Art. I, Sec. 10).

3. Because it authorizes the issuance of bonds payable more than forty years from the time of contracting the indebtedness sought to be refunded, contrary to the provisions of Section 18, Article XI, of the Constitution of California.

(1). The Constitution of California, Article IV, Section 25, prohibits the passage of any local or special law by the legislature relating to any of the subjects therein enumerated, and "in all other cases where a "general law can be made applicable" (Sub. 33).

The complaint shows upon its face that the bonds in question were issued under the act of March 1, 1893, "authorizing the common council, board of trustees, "or other governing body of any incorporated city or "town, other than cities of the first class, to refund its "indebtedness, issue bonds therefor, and provide for "the payment of the same" (amended and approved March 1, 1893).

The act in question is local and special because *it excludes from its operation cities of the first class,* while extending its privileges to all other classes of cities in the State of California.

Const. Cal., Art. IV, Sec. 25, Sub. 33, supra, p. 28.

To this point we cite:

City of Pasadena *vs.* Stimson, 91 Cal., 249.
Bruch *vs.* Colombet, 104 Cal., 351.
Darcy *vs.* Mayor of San Jose, 104 Cal., 642.
Welch *vs.* Bramlet, 98 Cal., 224.
Dougherty *vs.* Austin, 94 Cal., pp. 604, and 632 to 636.
(See also opinion of Mr. Chief Justice Beatty, Ibid., 620.)
Ex parte Westerfield, 55 Cal., 550.
Farrell *vs.* Board of Trade, 85 Cal., 408.
People *vs.* Fadden, 81 Cal., 499.
Earle *vs.* Board of Education, 55 Cal., 491.
Desmond *vs.* Dunn, 55 Cal., 242.
Miller *vs.* Kister, 68 Cal., 145.
People *vs.* Hoffman, 60 Howard Pr. (N. Y.), 324.
Sun Mutual Ins. Co. *vs.* Mayer, 4 Selden (N. Y.), 241.
Ayer's Appeal, 122 Pa. St., 266.
State *vs.* Hammer, 42 N. J. L., 439.
Lodi *vs.* State, 51 N. J. L., 402.
People *vs.* McConville, 35 N. Y., 449.
People *vs.* Supervisors, 43 N. Y., 13 to 21.
City of Topeka *vs.* Gilette, 32 Kansas, 431.

The refunding act of 1893 (Stats. Cal. 1893, page 59), under which the bonds in question were issued, is plainly obnoxious to several provisions of the Constitution of California prohibiting the passage of local and

special laws by the legislature. It requires no argument to show that the act is local in its operation, because by its terms all cites of the first class are excluded from its operation. It requires no argument to show that it is special, because, by its terms, rights, privileges and immunities which are expressly granted to cities other than cities of the first class are by the terms of the act denied to cities of the first class. The act provides for the assessment and collection of taxes in the cities to which it is made applicable, while excluding from its operation cities of the first class. That provision is to be found in Section 1, of the act, and is as follows:

"Said common council or other governing body "shall, at the time of fixing the general tax levy for "each year, and in the same manner for such tax levy "provided, levy and collect annually each year sufficient "money to pay one-fortieth part of the principel of "such bonds, and also the annual interest upon the "portion remaining unpaid, while the constitution prohibits the legislature from passing any local or special laws "for the assessment or collection of taxes."

Const. of Cal., Art. IV, Sec. 25, Sub. 10.
Const. of Cal, Art. XI, Sec. 12.

Again, the statute in question grants certain special and exclusive rights, privileges and immunities to municipal corporations, other than cities of the first

class, which are expressly denied to cities of the first class, namely, the right to refund their indebtedness, evidenced by bonds and warrants, upon the terms authorized by the act, whereas, the constitution expressly prohibits the legislature from passing any local or special law "granting to any corporation, association or "individual any special or exclusive right, privilege or "immunity."

Const. of Cal., Art. IV, Sec. 25, Sub. 19.

It manifestly appears that the subject of the act is one to which a general law can be made applicable, and it is impossible to conceive of any necessity or reason for discriminating between cities of the first class and cities of other classes in the matter of refunding their bonded indebtedness, yet the constitution prohibits the legislature from passing any local or special law in any case "where a general law can be made "applicable."

Const. of Cal., Art. IV, Sec. 25, Sub. 33.

Constitution mandatory.

These constitutional limitations are the more imperative because the constitution expressly declares that they are not directory, but mandatory and prohibitory: "The provisions of this constitution ARE MANDATORY

"AND PROHIBITORY, unless by special words they are de-
"clared to be otherwise."

Const. Cal., Art. I, Sec. 22.

Limitations present judicial questions.

Under this provision the Supreme Court of California has uniformly held that all questions concerning the constitutionality of local and special laws are JUDICIAL QUESTIONS to be determined by the court in upholding and enforcing the limitations of the constitution, regardless of any conclusion reached or acted upon by the legislature in that behalf. In the case of Darcy *vs.* The Mayor of San Jose, *supra*, the court, in the course of an elaborate review of this constituional limitation upon special legislation, says: "The de-
"murrer is upon the ground that the act of the legisla-
"ture upon which plaintiff relies is unconstitutional
"and void because, (1) It contravenes Subsivision 29,
"Section 25, Article IV, of the Constitution. It con-
"fers special privileges upon policemen, and imposes
"burdens upon cities, arbitrarily selected from those
"which stand in the same relation to the subject of the
"law, and the classification contained in the act is not
"founded upon any constitutional distinction. * *
"* The city of San Jose was incorporated by special
"act of the legislature, March 17, 1874. * * * It is
"said by appellant that the legislature may classify
"the municipal corporations (Const., Art. XI, Sec. 6),

"and may amend this classification at any time. That "a law is general which operates upon all of a class. "The manner of the classification is for the legislature "(People *vs.* Henshaw, 76 Cal., 442). By this act the "legislature amended the act of 1883 classifying cities, "and made a class containing from ten thousand to "twenty-five thousand inhabitants. The law applies "alike to all within the class. It is, therefore, a gen- "eral law.

"The statute in question says nothing about classify- "ing. Counsel is right, however, as to the construc- "tion of this statute. Every special law classifies, un- "less applied to named individuals, and hence, by this "logic, no limitation is imposed upon the power of the "legislature by the numerous constitutional provisions "against special law. To illustrate: It is desired to "raise the salary of a police officer in San Jose. It "cannot be done by a special law saying the salary of "James Darcy is hereby raised from seventy-five to one "hundred dollars per month. But it can as easily be "done by simply designating a class which shall in- "clude Darcy, and may not include any one else. In "Dougherty *vs.* Austin, 94 Cal., 601, it is said: 'If there "'is any one feature of the constitution more marked, "'any characteristic more pervasive than all others, it "'is this oft reiterated, this general and specific inhibi- "'tion of local and special laws.' And yet if they can "be thus easily evaded, how ineffectual and farcical "they are. Legislatures and courts are not at liberty

"to disregard a policy so plainly manifested in the "fundamental law. But while the sovereign will is "thus plainly expressed in the fundamental law, the "rule must not receive an interpretation too absolute. "It will not be presumed that it was intended to de- "prive the legislature of all power to adapt its laws to "the varying condition of its inhabitants. From ne- "cessity it has been held that the legislature may "classify in order that it may adapt its legislation to "the needs of the people. If this cannot be done, laws "will not always bear equally upon the people. *This* "*classification*, however, *must be founded upon differ-* "*ences* which are *either defined by the constitution or* "*natural*, and which will suggest a reason which might "rationally be held to justify the diversity in the legis- "lation. *It must not be arbitrary*, for the mere pur- "pose of classification, that legislation really local or "special may seem to be general, but for the purpose "of meeting different conditions naturally requiring "different legislation. (Dougherty *vs.* Austin, 94 Cal., "601; City of Pasadena *vs.* Stimson, 91 Cal., 238.)

"The true rule has been still more strongly ex- "pressed in numerous cases in other states. In Ayar's "Appeal, 122 Pa. St., 266, it is said: 'Some of the cases "'above cited have been quoted at considerable length "'for the purpose of showing why this court never in- "'tended to sanction classification as a pretext for spe- "'cial or local legislation. On the contrary, the under- "'lying principle of all the cases is, that classification,

"'with a view of legislating for either class separately,
"'is essentially unconstitutional, unless a necessity
"therefor exists—a necessity springing from manifest
"'peculiarities clearly distinguishing those of one class
"'from each of the other classes, and imperatively de-
"'manding legislation for each class separately that
"'would be useless and detrimental to the others.' *
"* * In State *vs.* Hammer, 42 N. J. L., 439, it is said:
"'But the true principle requires something more than
"'a mere designation of such characteristics as will
"'serve to classify, for the characteristics which thus
"'serve as a basis for classification must be of such
"'a nature as to mark the object so designated as
"'peculiarly requiring exclusive legislation. There
"'must be a substantial distinction, having a reference
"'to the subject-matter of the proposed legislation be-
"'tween the object or places embraced in such legisla-
"'tion, and the objects or places excluded. The marks
"'of distinction on which the classification is founded
"'must be such, in the nature of things, as will, in some
"'reasonable degree, at least, account for or justify the
"'restriction of the legislation.' This language has
"been often cited by other courts as a correct state-
"ment of the rule.

"In Lodi *vs.* State, 51 N. J. L., 402, it is said: 'The
"'rule is that in any classification, for the purpose of a
"'general law, all must be included and made subject
"'to it, and none omitted that stand upon the same
"'footing regarding the subject of legislation. To OMIT

"'ONE, SO CIRCUMSCRIBED, IS AS FATAL A DEFECT AS TO IN-
"'CLUDE BUT ONE of the number. * * *' Again, in
"Doughetry *vs.* Austin, 94 Cal., 60, it is intimated that
"the classification authorized is only for the pur-
"pose of incorcorpation and organization. This law
"can hardly be said to be for either purpose. * * *
"The law in question here, if the class specified
"would include San Jose alone, is a law limiting
"the discretion of the council of San Jose in re-
"gard to the compensation of policemen. There is
"nothing in the fact that the population is between
"ten thousand and twenty-five thousand which sug-
"gests a possible reason for excepting such municipal-
"ity from the general rule. No rational ground for
"the distinction appears. The classification is, there-
"fore, arbitrary and unauthorized."

Darcy *vs.* Mayor of San Jose, 104 Cal., 644 to 649.

In Bruch *vs.* Colombet, *supra*, the court, holding an act of the legislature classifying cities for certain school purposes, and providing one rule for school districts having boards of education, and a different rule for school districts not having such boards, to be local and special, and therefore, unconstitutional, says: "Of
"course, as has been frequently decided, the prohibi-
"tion of special and local laws cannot be evaded by
"arbitrary classification. In fact, a special law—
"special, as opposed to general laws on the one hand

"and private acts on the other—classifies the subjects "of the law for the purpose of the special provision. "This classification is the very thing prohibited by the "constitution. * * I think, therefore, special leg- "islation is prohibited, even when we can see, or think "we can, that special privileges are given to no one."

Bruch *vs.* Colombet, 104 Cal., 351-2.

In The City of Pasadena *vs.* Stimson, the Supreme Court, applying Sub. 33 of Section 25 of Article IV of the Constitution, held that part of the law relating to the exercise of the right of eminent domain, which discriminated between cities of the fifth and sixth classes, and other cities in the State, unconstitutional, and said: "It is true that the legislature is empowered by Sec- "tion 6 of Article XI of the constitution to classify "cities and towns in proportion to population, for the "purpose of incorporation and organization, and it is "undoubtedly true that a law limited to these purposes "is not unconstitutional because it makes different "regulations for different classes, but the mode of ex- "ercising the power of eminent domain, and the condi- "tions upon which it may be invoked, are no part of "municipal organization. They are the subject of gen- "eral laws applicable to every person alike, and the "legislature has no power to make arbitrary discrimi- "nation in this respect between different classes of "persons. * * * The conclusion is, that although

"a law is general and constitutional when it applies "equally to all persons embraced in a class, founded "upon some natural or intrinsic or constitutional dis- "tinction, it is not general or constitutional if it confers "particular privileges or imposes peculiar disabilities "or burdensome conditions in the exercise of a com- "mon right, upon a class of persons arbitrarily selected "from the general body of those who stand precisely "in the same relation to the subject of the law."

City of Pasadena *vs.* Stimson, 91 Cal., 249-251.

It was contended by petitioner's counsel in the circuit court, that the issuance of refunding bonds is to be distinguished from the exercise of the right of eminent domain, because, as stated in the Pasadena case, the power of eminent domain, and the conditions upon which it is invoked, are no part of municipal organization, while, according to his contention, the issuance of refunding bonds is a part of municipal organization. The distinction thus drawn by counsel seems to us to be without the slightest foundation in reason. If the acquisition of land for streets and squares, and other public uses, is no part of municipal organization, how can provision for paying for such land, or for refunding a bonded indebtedness incurred for such purposes, or for other public improvements, be a part of municipal organization? They stand upon the same footing precisely, belong equally to all municipal corpora-

tions, and it is in each case equally impossible to suggest any reason, founded in nature or in the Constitution, for discriminating among cities with respect to either incident of municipal government.

In the case of Earle *vs.* Board of Education, *supra*, the Supreme Court, discussing the constitutionality of an act classifying the public school districts of the State so as to apply a rule to cities of one hundred thousand inhabitants and over, different from the rule applied to teachers in cities and districts of smaller population, said: "A special law is one referring to a "selected class as well as to a particular object. This "act refers to a selected class, viz: teachers in cities of "one hundred thousand inhabitants," and the court accordingly held the act to be unconstitutional as special legislation.

Earle *vs.* Board of Education, 55 Cal., 489.

In *Ex parte* Westerfield, *supra*, the court held that a law is not general merely because it applies equally to all of a class arbitrarily defined, saying, "A general law "must be as broad as its object." Commenting upon this decision, Chief Justice Beatty, in Dougherty *vs.* Austin (94 Cal., 622), says: "Therefore, a law, the ob- "ject of which is to provide for the payment of county "expenses arising from unforeseen contingencies, must "be as broad as the State, FOR IT IS ABSURD TO SAY THAT "UNFORESEEN CONTINGENCIES WILL HAPPEN IN SOME "COUNTIES BUT NOT IN OTHERS."

In Miller *vs.* Kister, *supra*, the Supreme Court of California holds that the classification of counties, established by the act of 1883, for a legitimate purpose, cannot be made the basis of discriminating legislation, even when it relates to the compensation of county officers.

An examination of the decisions of the Supreme Court of California, from the time of the adoption of the constitution in 1879 to the present, discloses a growing tendency to enforce the limitations of the constitution upon special legislation more and more literally, in order to carry out the spirit and evident purpose of the constitutional convention and of the people in the adoption of that fundamental law, and this growing tendency is but the natural result of the clearer recognition of a strongly manifested fixed purpose on the part of the people and their representatives in the constitutional convention to circumscribe what they conceived to be a vicious system of legislation within the narrowest possible limits. In the language of Chief Justice Beatty, in Dougherty *vs.* Austin (94 Cal., 620): "If there is any one feature of the constitution more "marked, any characteristic more pervasive, than all "others, it is this oft reiterated, this general and spe- "cific inhibition of local and special laws."

There was certainly ample warning given by the Supreme Court of California to all the world before the passage of the act in question, that a local or special law of that kind would be held unconstitutional upon any and all of the grounds which we have discussed.

for the decisions in Dougherty *vs.* Austin, Pasadena *vs.* Stimson, Earle *vs.* Board of Education, and several of the other clear and strong decisions of the Supreme Court of California on this question, had been rendered and published long before the passage of the act. The act itself is so flagrantly at variance with the limitations of the constitution that it would seem to have been passed in defiance of the mandatory and prohibitory command of the constitution that the legislature of California shall not pass local or special laws on any of the subjects covered and provided for in this law.

In view of the very strong and clear position taken by the Supreme Court of California upon the question, it is hardly necessary to make any further suggestion concerning the right or propriety of judicial examination and enforcement of the limitations of the constitution upon special legislation, but if it were necessary to show affirmatively that a general refunding law "can be made applicable," that showing was made by the legislature of California itself in acts upon that subject passed both before and after the passage of the act in question.

Political Code of Cal., Sec. 4445, *et seq.*

County Government Act, Sec. 25, Sub. 14 (Stats. Cal. 1893, p. 353.)

The law being unconstitutional, the bond issue made under its provisions was absolutely and necessarily

void. No consideration of hardship can be urged in this case in favor of the bondholders, first, because they were bound to know whether the law under which the bonds were issued was constitutional or unconstitutional, and, secondly, because the city of Santa Cruz is at least as unfortunately situated as they are, the instruments which are sued upon as municipal bonds having been taken from the city of Santa Cruz, not by purchase, but fraudulently and without consideration by an act of grand larceny.

People *vs.* Smallman, 55 Cal., 185.
People *vs.* Shaughnessy, 110 Cal., 598.

IV.

THE SO-CALLED REFUNDING ACT UNDER WHICH THE BONDS AND COUPONS IN QUESTION PURPORT TO HAVE BEEN ISSUED DID NOT AUTHORIZE THE ISSUANCE OF ANY BONDS OR COUPONS BY THE CITY OF SANTA CRUZ (*Error No. 1, Rec., p. 260; Error No. 52, p. 299; Error No. 61, pp. 301-2; Refunding Act, supra*, p. 37. Special Features, Supra, p. 41, 109, 119.

The court will observe that there is an extraordinary hiatus in the refunding act of March 1, 1893. While the act in question gives power to the governing body of any city within the classes selected, to submit to the qualified electors thereof, at an election to be held for that purpose, the question of refunding its outstanding indebtedness, evidenced by bonds and warrants

ship, 132 U. S., 340; Hill *vs.* Memphis, 134 U. S., 198, 203; and Merrill *vs.* Monticello, 138 U. S., 673, 687, 691; in all of which the same rule of law was maintained.

In Hill *vs.* Memphis, supra, Mr. Justice Field, delivering the opinion of the court, said: "The inability "of municipal corporations to issue negotiable paper "for their indebtedness, however incurred, unless au- "thority for that purpose is expressly given, or neces- "sarily implied, for the execution of other express "powers, has been affirmed in repeated decisions of "this court."

In Merrill *vs.* Monticello, supra, it was held that the implied power of the municipal corporation to borrow money to enable it to execute the powers expressly conferred upon it by law, if existing at all, did not authorize it to create and issue negotiable security to be sold in the market and to be taken by the purchaser free from the equities that might be set up by the maker; and that to borrow money, and to give a bond or obligation therefor, which might circulate in the market as a negotiable security, free from any equities that might be set up by the maker of it, were essentially different transactions in their nature and legal effect.

"It is a general and undisputed proposition of law "that a municipal corporation possesses and can exer- "cise the following powers, and no others:

"1. Those granted in express words;

"2. Those necessarily or fairly implied in or inci-
"dent to the powers expressly granted;

"3. Those essential to the declared objects and pur-
"poses of the corporation—NOT SIMPLY CONVENIENT, BUT
"INDISPENSABLE.

"Any fair, reasonable doubt concerning the exist-
"ence of the power is resolved by the court against the
"corporation, and the power is denied."

Dillon on Municipal Cor., (4th Ed.), Sec. 89.
Von Schmidt *vs.* Widber, 105 Cal., 157.
Ottawa *vs.* Carey, 108 U. S., 110.

"The rule of strict construction of corporate powers
"is applicable to grants of powers to municipal and
"public bodies which are out of the usual range or
"WHICH MAY RESULT IN PUBLIC BURDENS, or which, in
"their exercise, touch the right to liberty or property,
"or, as it may be compendiously expressed, any common
"law right of the citizen or inhabitant."

Dillon on Mun. Cor., 4 Ed., Sec. 91.
Von Schmidt *vs.* Widber, 105 Cal., 157.

"There is a marked distinction between the inci-
"dental powers that are implied in favor of the acts of
"a business corporation and those of a municipal cor-
"poration. The inability of a business corporation to
"avoid its obligation upon the plea of *ultra vires*, when

thereof, and specifies the manner in which such election shall be called and held, and the form of notice to be given of such election, there is no provision in the act, or in any other act or law, as to what shall be the result of a vote favorable to refunding at such election. It does not say, either in terms or in substance, that if the vote at such election be favorable to refunding, the city, or its governing body, or any officer or agent, shall have power to make or issue refunding bonds; but, immediately after providing for the election, and without any provision concerning the effects of the election, if favorable to refunding, it proceeds to describe bonds, the issuance of which it may or may not have been the intention of the legislature to provide for. To say the least, the act is very crudely and defectively drawn in that particular; and the conjectures or guesses concerning the meaning of that part of the act indulged and followed by the self-constituted governing body, and officers of the city of Santa Cruz, pretending to act under it, were as curious as the act itself is obscure.

Counsel for plaintiff, in their argument on the question of law raised by our demurrer to the amended complaint herein, in the circuit court, while admitting, practically, the deficiencies of the refunding act of 1893, contended, and may still contend, that such deficiencies, and the apparent defects of such act, are cured by its title; but we respectfully submit that the title of the act in question, instead of curing the de-

fects in the act, or aiding to support the construction that it authorizes the issuance of bonds, tends, on the contrary, to emphasize its weaknesses and to demonstrate its utter failure as an enabling act, authorizing the issuance of bonds.

It will be noticed that the act of March 1, 1893, is entitled as follows: "An act to amend an act entitled "'An act to authorize the common council, board of "'trustees, or other governing body of any incorpor-"'ated city or town, other than cities of the first class, "'to refund its indebtedness, issue bonds therefor, and "'provide for the payment of the same,' approved "March 15, 1883."

The title does not indicate an intention on the part of the legislature to authorize any incorporated city or town to issue bonds or provide for the payment of the same; but by its terms it is declared to be an act to amend an act that did authorize the issuance of bonds, and did authorize common councils and other governing bodies to provide for the payment of the same. The omission in the body of the act of March 1, 1893, cannot be attributed to accident or oversight, because the provision for issuance of bonds and making provision for the payment thereof was contained in the act of March 15, 1883, which this act of March 1, 1893, amended. Therefore, the legislature, *ex industria*, struck out of the act which it was amending all provision for the issuance of bonds.

In the circuit court, counsel, referring to this manifest and fatal omission in the statute, said that a provision in the act for the issuance of bonds by a municipality proceeding under the act, was not necessary, because such provision is contained in the Constitution of the State, and that the constitution becomes operative in that respect to authorize the issuance of bonds whenever the proceedings provided for in the Act of March 1, 1893, have been had and taken. We think counsel was unfortunate in this suggestion, AS THERE IS NO SUCH PROVISION IN THE CONSTITUTION, and counsel will look in vain for any such constitutional or statutory provision authorizing or under which the city of Santa Cruz could have issued these bonds.

It is well settled that, in the absence of express authority given either by the constitution or the statute, a municipality has no power to issue bonds, and that bonds issued by a municipality, without such statutory or constitutional authority, are absolutely void.

Wells *vs.* Supervisors, 102 U. S., 625.
Claiborne County *vs.* Brooks, 111 U. S., 400.
Concord *vs.* Robinson, 121 U. S., 165.
Kelly *vs.* Milan, 127 U. S., 139.
Brenham *vs.* German-American Bank, 144 U. S., 173.
Lehman *vs.* San Diego, 48 U. S. App., 681.
McCoy *vs.* Bryant, 53 Cal., 241.

In Brenham *vs.* German-American Bank, supra, bonds were issued by the city of Brenham, in Texas, in July, 1879, to the amount of $15,000, under the assumed authority of an act of the legislature of Texas incorporating the city and giving its council authority to borrow, for general purposes, not exceeding $15,000, on the credit of the city. It was held by the court that, notwithstanding its power to borrow money, the city had no authority to issue negotiable bonds since such authority had not been expressly conferred by statute, and that, therefore, even a bona fide holder of such bonds could not recover against the city on them or their coupons. In this well-considered case, after reviewing all of the authorities bearing on the question, the court lays down the rule that power in a municipal corporation to borrow money is not nugatory, although unaccompanied by power to issue negotiable bonds therefor, and that, as it is easy for the legislature to confer upon the municipality the power to issue such bonds, if it be not done, under the well-settled rule that any doubt as to the existence of such power ought to be determined against its existence, the power must be held not to exist.

In the course of its opinion on this question, the court took occasion to review its decisions in the cases of Police Jury *vs.* Britton, 15 Wall., 566; Claiborne County *vs.* Brooks, 111 U. S., 400; Concord *vs.* Robinson, 121 U. S., 165; Kelly *vs.* Milan, 127 U. S., 139; Norton *vs.* Dyersburg, 127 U. S., 160; Young *vs.* Clarendon Town-

"it has received and retained the consideration for its "obligation, has no application to a municipal corporation. The former is organized for the profit of its "members, and its executed acts in purported furtherance of that object, unless restrained by its charter, "or prohibited by positive law, will be upheld; whereas, municipal corporations are organized for governmental purposes, and invested with a portion of the "authority which properly appertains to the sovereign "power of the State, and can exercise only such powers "as are expressly conferred or necessarily implied."

Von Schmidt *vs.* Widber, 105 Cal., 157-8.

V.

IT APPEARS UPON THE FACE OF THE COMPLAINT AND BY THE FINDINGS OF FACT THAT THE BONDS AND COUPONS IN QUESTION, AND EACH AND ALL THEREOF, CONSTITUTED AN OVER-ISSUE OF BONDS, IN EXCESS OF THE LIMITATION IMPOSED BY LAW UPON THE CONTRACTION OF BONDED INDEBTEDNESS BY THE CITY OF SANTA CRUZ *(Rec., pp. 3, 18-20, 23; Error No. 1, p. 260; Error No. 44, p. 289; Error No. 45, p. 289; Error No. 52, p. 298; Error No. 60, p. 301).* Specifications, Supra pp. 41, 91-2, 109-118.

The findings (Rec., pp. 34-7, 44) show, as the complaint alleged (Rec., pp. 6, 7) that the refunding bond issue of $360,000 in question, added to the bonded indebtedness of the city of Santa Cruz outstanding at the

time of such issue, constituted more than 15 per cent. of the assessed value of all the taxable real estate and personal property of said city of Santa Cruz. This fact is established, regardless of the judgment of the court as to the validity of the $89,000, mortgage indebtedness of the City Water Company of Santa Cruz as a debt of the city of Santa Cruz subject to refunding. Even if the court should hold that that indebtedness of the private corporation was subject to refunding, yet the pleadings and findings show that the refunding bond issue increased the bonded indebtedness of the city of Santa Cruz to $631,000, or over 16 per cent. of the total assessed value of all real and personal property in the city of Santa Cruz.

By an act passed in 1891 (Stats. Cal. 1891, p. 84), amending a former act limiting the contraction of such indebtedness to a smaller percentage, it was provided (Sec. 5): "No city, town, or municipal corporation "shall incur an indebtedness for public improvements "which shall in the aggregate exceed 15 per cent. of the "assessed value of all the taxable real estate and per- "sonal property of such city, town, or municipal cor- "poration." The statute containing this limitation purported to authorize cities and towns to contract bonded indebtedness within that limit for public improvements. It was urged on the oral argument that this statute imposed a limitation only upon the contraction of such bonded indebtedness for public improvements, and had

no application to the creation of a bonded indebtedness for any other purpose. Assuming this to be so, although we dispute it, we are not driven to the necessity of discussing it, for we find that by the charter of the city of Santa Cruz (Stats. 1875-6, p. 193), a much more stringent limitation upon the contraction of such debts, or the issuance of such bonds, by the city of Santa Cruz, is imposed. Section 10 of that act is as follows: "The common council shall not create, audit, or allow, or permit "to accrue, any debt or liability above the actual revenue or available means in the treasury, that may be "legally apportioned and appropriated for such purpose; nor shall any warrant be drawn, or evidence of "indebtedness be issued, unless there shall be sufficient "money in the treasury legally applicable to meet the "same, except as hereinafter provided"; and the only provision thereinafter made for the contraction of any debt is found in Section 12 of the act, which authorizes the mayor and common council to provide for expenditures not exceeding ten thousand dollars, for any purpose authorized by the act, in excess of the revenue of the city for such purpose in the then fiscal year, and shall provide for the levy of a special tax for the payment of such debt in the same or succeeding fiscal year, provided that the special tax thus to be levied shall, for no one year, be more than one-half of one per cent. upon the assessed valuation of the taxable property. There is no provision in that act for any expenditure, except for

the salaries and supplies of officers and for public improvements.

Bonds issued in excess of limit fixed by law are void.

Doon Township *vs.* Cummings, 142 U. S., 366.
East Oakland *vs.* Skinner, 94 U. S., 255.
Lewis *vs.* Shreveport, 108 U. S., 282.
Marsh *vs.* Fulton County, 10 Wall., 676.
McPherson *vs.* Foster, 43 Iowa, 48.
North *vs.* Platt County, 29 Neb., 477.
Buchanan *vs.* Litchfield, 102 U. S., 276.
Litchfield *vs.* Ballou, 114 U. S., 190.
Dixon County *vs.* Field, 111 U. S., 83.
Lake County *vs.* Rollins, 130 U. S., 662.
Lake County *vs.* Graham, 130 U. S., 674.
Nesbit *vs.* Riverside Ind. Dist., 144 U. S., 610.
Lehman *vs.* San Diego, 83 Fed., 670-5.
Shaw *vs.* Ind. School Dist., 77 Fed., 277.

It was urged in the court below that the issuance of refunding bonds does not, in contemplation of law, increase the bonded indebtedness of a city issuing them, because the purpose of their issuance is to substitute them, as speedily as the transactions can be had, for the outstanding bonds to be cancelled by the refunding process; but it is well settled that the issuance of refunding bonds, except by way of immediate exchange for the bonds to be cancelled, does constitute an increase of the bonded indebtedness of the city, while both sets of bonds

are outstanding, and thus invalidates the refunding bond issue to the extent, at least, to which it exceeds the statutory or constitutional limitations. This question was elaborately discussed, and decided in accordance with our contention, in the case of Doon Township *vs.* Cummings, supra. In that case, the Constitution of Iowa limited the contraction of debts by county or other political or municipal corporations to 15 per centum on the value of taxable property within such county or corporation. Negotiable bonds were issued in excess of the constitutional limit by a school district, and sold by its treasurer for the purpose of applying the proceeds of the sale to the payment of the then outstanding bonded indebtedness of the district, pursuant to the statute of Iowa. The bonds, as in this case, were refunding bonds, and they were sold under a statutory authorization, coupled with the requirements that their proceeds should be applied to the payment of the outstanding bonded indebtedness of the district. In discussing the effect of the sale of these refunding bonds, the United States Supreme Court says: "There is a wide difference in the "two alternatives which this statute undertakes to au- "thorize. The second alternative, of exchanging bonds "issued under the statute for outstanding bonds, by "which the new bonds assume as issued to the holders "of the old ones, would be a substitute for and an ex- "tinguishment of them, so that the aggregate outstand- "ing indebtedness of the corporation would not be in- "creased, might be consistent with the constitution.

"But under the first alternative, by which the treasurer "is authorized to sell the new bonds, and to apply the "proceeds of the sale to the payment of the outstanding "ones, it is evident that if (as in the case at bar) new "bonds are issued, without a cancellation or surrender "of the old ones, the aggregate debt outstanding, and on "which the corporation is liable to be sued, is at once "and necessarily increased, and, if new bonds equal in "amount to the old ones are so issued at one time, is "doubled; and that it will remain at the increased "amount until the proceeds of the new bonds are ap- "plied to the payment of the old ones, or until some of "the obligations are otherwise discharged.

"It is true that if the proceeds of the sale are used by "the municipal officers as directed by the statute in pay- "ing off the old debt, the aggregate indebtedness will "ultimately be reduced to the former limit, but it is "none the less true that it has been increased in the in- "terval; and that unless those officers do their duty, the "increase will be permanent. It would be inconsistent "alike with the words and with the object of the consti- "tional provision, framed to protect municipal corpora- "tions from being loaded with debt beyond a certain "limit, to make their liability to be charged with debts "contracted beyond that limit, depend solely upon the "discretion or the honesty of their officers" (142 U. S., 371-2).

On the ground that the bonds in question in that case

were issued in excess of the limitation imposed by the Constitution of Iowa, they were held to be void, and the judgment of the circuit court upholding them was reversed, with instructions to enter judgment in favor of *Doon Township.*

See, also:

Shaw *vs.* Ind. School Dist., 40 U. S. App., 475; 77 Fed., 277.

In Dixon County *vs.* Field, supra, under a constitutional provision prohibiting any county, or other subdivision of the State, from making donation in the aggregation exceeding ten per cent. of assessed value, etc., the United States Supreme Court held that bonds issued by a county beyond ten per cent. of its assessed value were void, even in the hands of a bona fide holder, and although each bond, after stating the whole amount issued, stated that they were issued pursuant to an order of the county commissioner, and authorized by an election held on a certain day, and by virtue of certain statutes, and the constitution of the State, and bore a certificate of the secretary and auditor that "it was issued pursuant to law." "No recital," says the Court, "involving the amount of the assessed taxable valuation "of the property to be taxed for the payment of the "bonds, can take the place of the assessment itself, for "it is the amount as fixed by reference to record that is

"made by the constitution the standard for measuring "the limit of the municipal power" (111 U. S., 95).

In the case of Lake County *vs.* Graham, supra, the United States Supreme Court, discussing an effect of a similar limitation in the Constitution of Colorado, held that the county was not estopped, as against a bona fide holder for value, to show that the constitution has been violated by issuing bonds which recited the whole amount issued, and that they were issued "under and "by virtue and in full compliance with" a certain statute, and that "all the provisions and requirements of "said act had been fully complied with by the proper "officers in the issuing of these bonds" (130 U. S., 674).

These cases, and the other cases which we have cited, conclusively show, by reason and authority, that the sale or refunding bonds for the purpose of having the proceeds applied to the cancellation of existing obligations, do constitute an increase of the indebtedness of the municipality issuing them, to the extent of the face value of the refunding bonds so sold, and that where such increase is prohibited by any constitutional or statutory provision binding upon the municipality, the bonds are void, even in the hands of innocent holders for value. The court will observe that *there is no allegation, nor finding, nor proof in this action that a single one of the old bonds has ever been taken up.* It therefore appears that the bonded indebtedness of the city of Santa Cruz, as it existed on the 13th day of March,

1894, was doubled, or more than doubled, by the refunding bond issue.

In the circuit court counsel for petitioner referred to the fact that the Supreme Court of California, in the case of the City of Los Angeles *vs.* Teed (112 Cal., 319), had expressed the opinion than an issue of refunding bonds by a city did not increase the bonded indebtedness of such city. The Supreme Court of California was evidently mistaken in that suggestion. We use the term "suggestion" because the discussion of that question in the opinion of the Supreme Court is clearly *obiter dictum*, since the court held the bond issue under consideration in that case invalid because the bonds provided for the payment of the principal and interest to become due thereon, at a point outside of the State of California, to which the city treasurer of the city of Los Angeles could not legally either transport or transmit the funds of the city for the purpose of paying principal or interest on the bonds (112 Cal., 329-30).

Of course, the dictum of an august and learned tribunal such as the Supreme Court of California should be given serious consideration as argument, although it be not authority; but in the case of the City of Los Angeles *vs.* Teed it would seem that this rule does not apply with its usual force, because, in the opening statements of the opinion, on page 323, the court says: "The "case has not been as fully argued as its importance re- "quires, and some points absolutely indispensable to a "decision have not been at all referred to by counsel.

"This is especially to be regretted, as the questions in-
"volved are of great public importance, which we
"ought not to be asked to examine without the fullest
"assistance from counsel."

Certain it is that the conclusion reached by the Supreme Court of California, and announced in the dictum referred to, is directly at variance with the settled rule established by the decisions of the United States Supreme Court, and established by the common observation and experience of mankind. If an issue of refunding bonds to be sold for money, and the money afterwards to be applied to the redemption of previously outstanding bonds, does not increase the indebtedness of the city, it must follow that the plaintiff herein cannot maintain an action against the city of Santa Cruz, while the previously outstanding bonds remain unpaid.

If the alleged issue of refunding bonds in this case would not, if valid, constitute an increase of the indebtedness of the city of Santa Cruz, the circuit court should have dismissed this action, upon the ground that the city of Santa Cruz is not indebted to plaintiff, because it appears that the outstanding bonds for the redemption and refunding of which those bonds were issued, have not been paid, and that a refunding bond issue does not increase the indebtedness of the city issuing the bonds.

But it may be urged that the decisions of the United

States Supreme Court which we have cited referred to constitutional limitations upon the right of municipalities to incur indebtedness, while,, in this case, we are dealing with statutory limitations only. This contention cannot be seriously urged, for statutory provisions, being constitutional, are just as binding upon municipal corporations as constitutional limitations, and there is absolutely nothing in the refunding act of March 1, 1893, referred to in plaintiff's complaint, which, either directly or by implication, purports to repeal or amend, or in any way modify, any of the statutory limitations to which we have referred. Those statutory limitations are perfectly consistent with the act of March 1, 1893, and might have been incorporated in that act as provisos, without interfering with any of the provisions of the act, unless by subsequent development of fact it should appear that there were some cities within the selected classes that could not so refund their bonded indebtedness without exceeding the limitations. Of course, no other statute, the terms of which might have been incorporated as provisos in the act under consideration, *without necessarily interfering* with the accomplishment of its purpose, can be held to have been, by implication, repealed or amended by that act.

The court will observe that there is no repealing clause in the act of March 1, 1893, so that it makes no change in any statute other than the three sections of

the statute of 1883 which it purports to amend, unless such changes were made by *necessary* implication.

Again, we submit that the charter of the city of Santa Cruz, as enacted in 1876, could not, in the matter of refunding the bonded indebtedness of that city, be amended by the State Legislature by a general law, unless the city of Santa Cruz should elect to abandon its original charter, and to organize under the general law of the State relating to cities. The new constitution provides for the organization of cities and towns under general laws at the election of the cities thereof (Const., Art. II, Sec. 6), and provides that cities organized before the adoption of the constitution may, *by election*, organize under such general law. The complaint does not show that the city of Santa Cruz ever did elect to organize under any general law passed since the adoption of the constitution, and, in fact, the city of Santa Cruz has elected to continue its corporate existence and functions under the act of 1876 (Stats. 1876, p. 201).

It is well settled by the authorities which we have cited, and by other Supreme Court decisions which it would be quite superfluous to cite, that the legislature could not, by special act, amend Section 10 or Section 12 of the act constituting the charter of the city of Santa Cruz. The matter of refunding its bonded indebtedness is a business matter, belonging peculiarly to the exclusive province of the city of Santa Cruz itself under the present constitution; so that, if the re-

funding act had been general, instead of being local and special, as it is, it would still have been ineffectual to so amend the charter of the city of Santa Cruz as to authorize the issuance of the refunding bonds in question.

Recitals in bonds do not cure this defect.

It will, no doubt, be urged by counsel for plaintiff that, even though there was an issue beyond the limitation imposed by the statute of 1891, that fact cannot operate to defeat the bonds in the hands of innocent purchasers for value, but that such purchasers are protected, even against the over-issue, by the recitals contained in the bonds. The answer to this contention is, that there is no recital in the bonds to the effect that the amount of their issue was within the limitation imposed by the statute, and there is no reference in the recitals to the act of the legislature of the State of California of March 11, 1891, (Stats. Cal., 1891, p. 84), and no recital that the bonds were issued in compliance with that act.

In Buchanan *vs.* City of Litchfield, 102 U. S., 278, the bonds sued upon were declared invalid in the hands of a bona fide holder for value, because the amount of their issue, added to the theretofore outstanding indebtedness of the city of Litchfield, necessarily increased the indebtedness of such city beyond the 5 per cent. limitation imposed by the Constitution of Illinois (Constitution of Illinois, Art. IX, Sec. 12), and for the

reason that the bonds contained no recital of circumstances bringing them within the limit fixed by the constitution. In that case, the court, dealing with this very question, said: "Returning to the case in hand, it "will be observed that the bonds issued by the city of "Litchfield contain no recital whatever of the circum- "stances which, under the constitution of the State, "must have existed before the city could legally incur "the indebtedness for which the bonds were issued. "They purported, it is true, to be issued under the au- "thority of the act of April 15, 1873, and in pursuance "of the ordinance of the city based upon that statute. "But that statute does not expressly restrict the exer- "cise of the power to erect and maintain a system of "water works to cases in which the aggregate indebt- "edness of the city was within the limit which the con- "stitution declared no municipal corporation should "exceed. Nor does the same ordinance recite or state, "even in general terms, that the proposed indebted- "ness was incurred in pursuance of, or in accordance "with, the constitution of the State, or under the cir- "cumstances which permitted the issue of the bonds. "Consequently, a recital that the bonds were issued "under the authority of the statute, and in pursuance "of the city ordinance, did not necessarily import a "compliance with the constitution" (Ibid., 292).

In this case there is no recital in the bonds, either directly or inferentially, stating or suggesting that the

bonds were issued in conformity with the act of March 11, 1891 (Stats. 1891, p. 84). Nor is there any recital of circumstances tending to show that the bond issue was within the legal limit. Upon this specific question the court, in Buchanan *vs.* Litchfield, supra, says: "The "present action cannot be maintained unless we hold "that the *mere fact* that the bonds *were* issued, with- "out any recitals of the circumstances bringing them "within the limit fixed by the constitution, was, in it- "self conclusive proof, in favor of a bona fide holder, "that the circumstances existed which authorized "them to be issued. We cannot so hold."

To the same effect is the case of School District *vs.* Stone, 106 U. S., 183, in which certain bonds are declared invalid because of over-issue. The court held that a bona fide puhchaser for value was not protected by recital contained in the bonds, and in that action said: "But the recitals do not, as we have said, neces- "sarily import a compliance with the statute or the "fundamental law of the State upon that subject. "They necessarily imply nothing more than that the "bonds were issued by authority of the electors, and "that the election was held in conformity with the "statute. The statute may have been pursued as to "the notice required to be given of the time and place "of the election, and as to the manner in which the "will of the voters was to be ascertained, and yet it "may have been disregarded in respect to the limit it

"imposed upon district indebtedness. The declaration "therefore, that the election was held in conformity "with the statute, does not, with sufficient distinct- "ness, imply the indebtedness voted was less than 5 "per cent. on the value of the taxable property of the "district, as shown by the State and county tax "lists."

After referring to the doctrine of estoppel by recitals, as established by numerous decisions of the Supreme Court, the opinion continues: "But in all such "cases, as a careful examination will show, the recitals "fairly imported a compliance, in all substantial re- "spects, with the statute giving authority to issue the "bonds. We are unwilling to enlarge or extend the "rule now established by numerous decisions. Sound "public policy forbids it. Where the holder relies for "protection upon mere recitals, they should, at least, "be clear and unambiguous, in order to estop a muni- "cipal corporation in whose name such bonds have "been made, from showing that they were issued in "violation or without authority of law" (Ibid., 186-7).

All of the decisions of the Supreme Court of the United States, from Dixon County *vs.* Field, 111 U. S., 183, to Sutliff *vs.* Lake County Commissioners, 147 U. S., 230, agree that the purchasers of bonds issued by municipalities under the authority of law which limits the amount of bonds to be issued, at a certain percentage of the assessment rolls, or to a given rate of taxa-

tion based on such rolls, are charged with notice of the assessment rolls and of the amount of bonds which can be validly issued, based on such assessment rolls.

See, also:

Francis *vs.* Howard County, 13 U. S. App., 126, 165.

But, in addition to the constructive notice given to all purchasers and to all persons by the public statutes of the State, and the public records, including the assessment rolls, and the records of previous bond issues, it is clearly established by the evidence (Error No. 27, Rec., pp. 273-5; testimony, Rec., pp. 91 to 146) that nearly all of the holders of the bonds had actual notice that the amount of their issue, added to the then outstanding bonded indebtedness of the city of Santa Cruz exceeded 15 per cent. of the taxable valuation of the real and personal property in the city. Reference is here made to the prospectus or circular sent to these bondholders by Coffin and Stanton, when negotiations were being made concerning their sale or hypothecation, as shown by the depositions of most of the bondholders (Rec., pp. 91 to 146. See circular, Rec., p. 97). Such circular states, in terms, the amount of the assessed valuation of the taxable real and personal property in the city of Santa Cruz, the amount of the outstanding indebtedness, and the total amount of the refunding bond issue, namely: assessed value, $3,907,400; out-

standing water bonds, $320,000; refunding bond issue $360,000; making the total indebtedness showed $680,000.

The charter of the city of Santa Cruz (Sec. 40, Stats. Cal., 1875-6, p. 204) requires that there shall be entered on the public records of the city annual statements specifying, among other things, all evidences of indebtedness issued, and the portion thereof remaining outstanding.

In the late case of Sutliff *vs.* Lake County Commissioners, 147 U. S., 230, in which certain municipal bonds were held invalid, notwithstanding their recitals, the Supreme Court of the United States held that where the constitution and a statute of a State forbid any county to issue bonds to such an amount as will make its aggregate indebtedness exceed a certain proportion of the assessed valuation of taxable property in the county, and a statute requires the county commissioners to publish and to enter on the public records of the county semi-annually statements showing the whole amount of the county debt, a purchaser for value and before maturity of a bond issued in excess of the constitutional and statutory limit, is charged with the duty of examining the record of indebtedness, and the county is not estopped by a recital in the bond that all the provisions of the statute have been complied with, to prove by the record of the assessment and the indebtedness that the bonds were issued in violation of the constitution.

In this case, Mr. Justice Gray said: "In those cases "in which this court has held the municipal corpora- "tion to be estopped by recitals in its bonds, to assert "that they were issued in excess of the limit imposed "by the constitution or statutes of the State, the "statutes, as construed by the court, left it to the offi- "cers issuing the bonds to determine whether the facts "existed which constituted the statutory or constitu- "tional condition precedent, and did not require those "facts to be made a matter of public record. * * * "But if the statute expressly requires those facts to be "made a matter of public record, open to the inspection "of every one, there can be no implication that it was "intended to leave that matter to be determined and "concluded contrary to the fact so recorded by the offi- "cers charged with the duty of issuing the bonds."

The Lake County case cannot be distinguished in principle from the case at bar, and we respectfully ask its careful consideration, as we deem it conclusive of the question, as the findings conclusively show that the so-called refunding bond issue, added to the previously existing bonded indebtedness of the city of Santa Cruz, exceeded the legal limit of 15 per cent. upon the assessed value of all taxable real and personal property in the city, it follows that judgment against defendant must be reversed, because while only a portion of the refunding bond issue was in excess of the legal limit, there has been no segregation of the refunding bonds

by which or from which the court can ascertain what bonds were within the legal limit, and what bonds of the refunding issue were issued after the limit had been reached. Not only has there been no such segregation or showing, but there can be no such segregation or showing. A part of the single issue of bonds being invalid, the entire issue must be held invalid.

Aetna Life Ins. Co. *vs.* Lyon Co., 44 Fed Rep., 229.

Hedge *vs.* Jackson Co., 150 U. S., 182.

In Aetna Life Insurance Company *vs.* Lyon County, 44 Fed. Rep., 229, the court tersely states the rule as follows:

"When a portion of issue is valid and portion invalid, " judgment must be for the defendant."

In Hedges *vs.* Jackson County, supra, the United States Supreme Court held that holders of municipal bonds, issued by a county, in excess of its authority, cannot, by an offer to surrender and cancel so much of such bonds as may, upon inquiry, be found to exceed the limit authorized by law, invest a court of equity with jurisdiction to ascertain the amount of such excess, and to declare the residue of such bonds valid and enforce the payment thereof against the county.

The decision of the United States Supreme Court in the recent case of Board of Commissioners *vs.* Rollins,

19 S. C. R. No. 19, p. 390, does not conflict with our contention in this behalf. In that case, there was an express recital in terms, in the bonds, that they were within the statutory limit, and there was no public record from which purchasers could ascertain the amount of outstanding indebtedness, and the case seems to have turned on those points. In this case, there is no such recital, and the public record does, and did, show the amount of outstanding indebtedness.

VI.

THE BONDS AND COUPONS IN QUESTION WERE NOT SIGNED BY THE MAYOR OF THE CITY OF SANTA CRUZ, AND WERE, THEREFORE, NOT OBLIGATIONS OF THE CITY OF SANTA CRUZ *(Finding No. 9, Rec., p. 22; Finding No. 13, Rec., p. 24).*

Assignments of Error 47, 48, 49 and 50, Rec., pp. 290 to 296. Specifications, Supra pp 93 to 106.

The court found that on April 11, 1892, Wm. T. Jeter was duly elected mayor of the city of Santa Cruz, and, within ten days thereafter qualified and entered upon the duties of his office, and that thereafter on April 9th, 1894, Robert Effey was duly elected mayor, and, on April 16th following (the day of the date of the bonds), between 11 o'clock a. m. and 2 o'clock p. m., duly qualified as such (Rec., pp. 22-3), and further finds that some of the bonds in question "were signed by Wm. T.

"Jeter on April 16, 1894, after the qualification of his "successor in the office of mayor" (Rec., p. 24, Finding 13), and it further appears from the opinion of the court below, if it may be referred to for the purpose, that it is impossible to determine which of the bonds were signed before and which were signed after the qualification of Mr. Jeter's successor in office as mayor (Rec., p. 49).

We contend that Mr. Jeter had no authority to sign the bonds after the election and qualification of his successor; that the bonds signed after that time are void, and that, as it is impossible to segregate such bonds from the remainder of the issue, all must be held to be void.

His signature to certain of the bonds after the expiration of his term was the act of a private citizen, and not of a public officer authorized by law to execute negotiable instruments of the municipality, and the bonds, under a familiar rule, are void even in the hands of purchasers for value.

Coler *vs.* Clefurne, 131 U. S., 162.

Ordinance No. 320, which had the force of a statute, provided that the refunding bonds should be signed by the mayor (Finding 8, Rec., p. 20).

The charter of the city of Santa Cruz provides as follows (section 3 of an act to reincorporate the city of Santa Cruz, approved March 11, 1876, Stats. Cal. 1875-6, p. 189): "On the second Monday in April, A. D. one

"thousand eight hundred and seventy-six, and bienni-
"ally thereafter on the second Monday of April, a
"charter election shall be held at which the legally
"qualified voters of said city shall elect the several re-
"spective officers, as hereinafter provided, viz: A
"mayor and four councilmen—one from each ward,
"who shall be electors of the wards from which they
"are chosen; which mayor and councilmen shall hold
"their office for two years and until their successors
"are duly elected and qualified."

This is the only section of the charter providing for the commencement and ending of the terms of office of the mayor and common councilmen of the city, and there can be no question that under its plain terms the mayor-elect became mayor *de jure* on his qualification after the charter election, and that at such qualification the retiring mayor at once and instantly ceased to be an officer of the city of Santa Cruz. The statute will permit of no other construction.

Official terms should not be extended beyond time clearly defined, but rather shortened by implication, if necessary.

People ex rel. Harris *vs.* Branham, 3 Cal., 477.

The court below as a conclusion of law declares that at the time of the signing of the bonds on the afternoon of April 16, 1894, William T. Jeter was *de facto* mayor of the city of Santa Cruz (Rec., p. 25). This conclusion

of law is not supported by the findings nor by the evidence, and we contend that at the time of the signing of the bonds, William T. Jeter was neither *de facto* nor *de jure* mayor of said city, but a mere intruder and usurper, having no authority or power to bind the city in any manner whatever. It does not appear from the findings that Mr. Jeter signed the bonds in the council chamber of the city of Santa Cruz, nor in any public place where his acts might be observed by any of the officers or inhabitants of the city, but in the seclusion of his private office in the bank of Santa Cruz county, of which institution he was at the time president. It was no public exercise of any duty devolving upon the mayor of the city of Santa Cruz, but, as before said, was done privately and without the notice or knowledge of any person whomsoever (Rec., pp. 149-50). At the time he was not clothed with the insigna of office, nor was he acting in such a manner as to give notice to the public generally, nor to any part of the public, that he was acting, or pretending to act, as mayor of the city of Santa Cruz.

We contend that upon the qualification of his successor, Mr. Jeter's term of office ceased, and he thereafter was not mayor *de jure* of the city of Santa Cruz.

Jeter not Mayor de facto.

The only question remaining to be considered is, whether his act in signing the bonds on the afternoon

of the 16th of April, 1894, was the act of an officer *de facto*.

The court, as a conclusion of law (Rec., p. 25), finds that at the time of signing the bonds in question Mr. Jeter was *de facto* mayor.

Perhaps the leading case in the United States on the subject of *de facto* officers is that of the State *vs.* Anthony Carroll, 38 Conn., 449. The opinion given in that case is very exhaustive and refers to all prior decisions, both ancient and modern, bearing upon the subject. It has been cited as authority by almost every court having occasion to consider this question since the opinion of Mr. Chief Justice Butler was written, and it may be safely deemed to be the settled law upon the question in so far as its application to the facts of any individual case. Mr. Chief Justice Butler, in reviewing the decisions rendered by the courts, both of England and the United States, from the earliest time down to the present, says as follows:

"A definition sufficiently accurate and comprehen-
"sive to cover the whole ground must, I think, be sub-
"stantially as follows: An officer *de facto* is one whose
"acts, though not those of a public officer, the law upon
"principles of policy and justice will hold valid so far
"as they involve the interests of the public and third
"persons where the duties of the office were exercised.

"First. Without a known appointment or election,
"but under such circumstances of reputation, or ac-
"quiescence as were calculated to induce people, with-

"out inquiring, to submit to or invoke his action, sup-
"posing him to be the officer he assumed to be.

"Second. Under color of a known and valid ap-
"pointment or election, but where the officer had failed
"to conform to some precedent requirement or condi-
"tion, as to take oath and give a bond or the like.

"Third. Under color of a known election or appoint-
"ment, void because the officer was not eligible, or be-
"cause there was a want of power in the electing or ap-
"pointing body, or by reason of some defect or irregu-
"larity in its exercise, such ineligibility, want of power
"or defect being unknown to the public.

"Fourth. Under color of an election or appointment
"by or pursuant to a public unconstitutional law, be-
"fore the same is adjudged to be such.

"Anything less comprehensive and discriminating
"would, I think, be imperfect and deceptive as a defini-
"tion."

This definition has been quoted approvingly by many of the courts of the land, and the opinion in which it appears has always been most highly commended as being, not only very learned and exhaustive, and remarkable for its research and reason, but as well one which will stand as a landmark of the law upon the subject.

5 Am. & Eng. Enc. of Law, 96.

Under which, if any, of these classes does Mr. Jeter fall?

It is evident that he does not come within the second, third or fourth classes referred to in the definition, and there only remains to be considered whether or not he falls within the first class.

We claim that the opinion of Mr. Chief Justice Butler, which must be regarded as law, absolutely sustains our position that Mr. Jeter, at the time of the signing of the bond on the afternoon of April 16, 1894, was not mayor *de facto* of the city of Santa Cruz.

Mr. Chief Justice Butler, in considering this question, had occasion to refer to the case of Brown *vs.* Lunt, reported in 37 Maine, 322, and he did so in the following language: "A similar case arose in Maine in "1854, Brown *vs.* Lunt, 37 Me., 322. A justice of the "peace, an annual officer, without legal right to hold "over, who had been justice of the peace for many "years in succession, was not re-appointed, but contin- "ued to act, and took the acknowledgment of an im- "portant deed. The question was raised whether the "act was valid and the deed good. The deed was exe- "cuted about two years after his term of office expired, "and the court held the acknowledgment good. In an "elaborate and learned opinion, they say that an officer "*de facto* is one who has the reputation of being an officer "(citing from Parker *vs.* Kett, and Rix *vs.* Level), or one "who actually performs the duties of an office with ap- "parent right and under claim and color of an appoint-

"ment or election, or one who exercises the duties of "an office with at least a fair color of right or an ac- "quiescence by the public in his official acts so long "that he may be presumed to act as an officer by right "of an appointment or an election. The case was sus- "tained on all these grounds. It was a case where "there was sufficient reputation and sufficient grounds "for presumption, but in my judgment *not a case of* "*color*. It seems to me absurd to say that color from "election or appointment can extend beyond the dis- "tinct and independent term for which the officer was "elected or appointed—beyond the term when the "election or appointment could be operative if legal."

With like reason it must be held that upon the expiration of Mr. Jeter's term of office, that is to say, at the time of the qualification of his successor at noon on April 16, 1894, his color of right to the office ceased to exist, and thereafter, if he continued either privately or otherwise to discharge his duties, or to attempt to discharge the duties of the office, his acts were illegal and void, as those of a usurper and intruder, unless, indeed, he continued so to exercise and discharge in a public manner the duties of the office until he had acquired, by reputation and general acquiescence, the status of a *de facto* officer.

To hold that such reputation could be acquired in the space of three hours, during which time the person alleged to be an officer *de facto*, was confined within

the walls of his own private office, attending to his private duties, and not discharging, or attempting to discharge, any of the responsibilities devolving upon the chief executive of the municipality, would, it seems to us, be manifestly absurd. Reputation cannot be acquired in that manner, nor in such limited time, and the public had no opportunity to acquiesce, for the public did not know that Mr. Jeter pretended to act as mayor of the city, or that he was performing any duty which by right should devolve upon the mayor of the city of Santa Cruz.

There was, therefore, no reputation, no acquiescence by the public; there was simply the unauthorized act of a citizen who had been mayor of the city, but who, by the votes of the people, by the election of his successor, and his qualification, had been retired to the walks of private life.

It must in this connection be remembered that the signing of the bonds by Mr. Jeter was done privately, not publicly, and therefore such cases as may be cited by counsel for plaintiff, where it has been held that the act of an officer performed publicly after the term of his office had expired, was the act of an officer *de facto*, are not to the point.

In Connelly *vs.* Ashworth, 98 Cal., 205, the case was tried by the court without a jury, and its decision given in writing, and signed by the judge, but not filed with the clerk until after the term of office of the judge had expired, it was held by the Supreme Court of the State

of California that, when the term of office of the judge who tried the case expired before such decision was filed, the fact that it was signed by him, and ordered by his successor in office to be filed with the clerk, and was so filed, is not sufficient to sustain the judgment thereon.

And again, the Supreme Court of the State of California has said that upon the expiration of the term of office of a judge, his judicial power ceases, and it is not competent for him thereafter to do any act necessary to complete the trial of any cause which remains unfinished at the expiration of his term.

Broder *vs.* Conklin, 98 Cal., 360.

The rule universally followed by the courts of California has been that upon the expiration of the term of office of any officer, his power as such officer ceases, and any act performed by him thereafter as such officer is a nullity and has no force or effect, unless indeed he holds over under some color of right.

"One who has held the office of supervisor is, after the "expiration of his term and the election and qualifica- "tion of his successor, no longer an officer, either *de jure* "or *de facto*, but if he attempts to act as such, is a mere "naked usurper."

Trinity Co. *vs.* McCamnom, 25 Cal., 117.

"Upon the expiration of the officer's term, unless he is

"authorized by law to hold over, his rights, duties and "authorities as a public officer must *ipso facto* cease."

Mechem on Public Officers, Sec. 396.
Badger *vs.* United States, 93 U. S., 599.
People *vs.* Tieman, 8 Abb. Pr. (N. Y.), 359.
Vogel *vs.* State, 5 West Rep., 546.
Eilison *vs.* Alme, 9 West Rep., 730.

One who holds over after his term of office expires is an intruder, and he does not become an officer *de facto* until he has held for such a length of time that reputation and general acquiescence have established color of right.

"The existing appearance of right which may mislead, "is the essential ground of the doctrine, for otherwise "there is no excuse for the party deceived and on basis "for a demand of protection. There must be either some "appointment or election which might be supposed to be "valid, and possibly such an occupation of the office "without dispute and with general acquiescence as "would reasonably lead to the inference that such au- "thority existed, although not at the time known."

Williams *vs.* Boynton, 147 N. Y., 432.
Corey *vs.* Curtis, 9 Nev., 325.

It has been held that, "Justices who exercise the func- "tions of their office after the expiration of their term,

" and after their legal successors have duly qualified, are " not even officers *de facto,* but mere usurpers, without " even the color of office."

Becker *vs.* People, *ex rel.* Wilson, 156 Ill., 301.

In the case last cited, the supreme court of Illinois said: "On the first Monday in May, 1893, the defend- " ants' title to their office expired by lapse of time, and " from that time they were not even officers *de facto,* but " were mere usurpers, without even the color of office. " The judgment of the court finding them guilty and " ousting them from the office which they were thus " usurping, was therefore clearly right."

Acts of *de facto* officers who exercise their office for a considerable length of time are as effectual when they concern the rights of third persons or the public as if they were officers *de jure,* but to constitute one an officer *de facto* there must be an actual exercise of the office, and acquiescence of the public to cause in the mind of the citizen a strong presumption that the officer was duly elected.

Hughes *vs.* Long, 119 N. C., 52.
Gilliam *vs.* Reddick, 4 Ired., 368.
Burke *vs.* Elliott, 4 Ired., 355.
State *vs.* Lewis, 107 N. C., 967.

Effey was de facto, as well as de jure, mayor.

At the time of his qualification, between 11 o'clock a. m. and 2 o'clock p. m. of April 16, 1894, Robert Effey became mayor of the city of Santa Cruz, and was actually inducted into and in the possession of the office, for the filing of his oath of office was an assumption of its functions, and he was therefore *de facto* as well as *de jure* mayor. To be sure, he did not publicly perform any of the duties of mayor of said city until the time of the next regular meeting of the council as fixed by the statute (Stats. 1875-6, Sec. 7, p. 192), on the first Monday in May, 1894, but this does not controvert the proposition that after his qualification he was actually and lawfully mayor of the city of Santa Cruz. If there had been any duty for him to perform as mayor of such city after his qualification and before the next regular meeting of the council, it must be presumed that, as such mayor, he would have performed such duty. As the legal mayor of the city of Santa Cruz, he certainly had nothing to do with the actions of an illegal mayor, nor with presiding over meetings of an illegal council, pretending to transact business for and in the name of the city of Santa Cruz at pretended special meetings called by themselves, and not provided for by any statute or ordinance, between the 16th day of April, 1894, and the first regular meeting of the common council in the month of May. It does not appear that any notice was given of any such special meetings, nor that the mayor-elect, or

the public, had any notice or knowledge of any of such meetings.

It is a well settled rule that there can be no officer *de facto* where there is an officer *de jure* in possession of the office, and we have shown that Mr. Effey by filing his oath, the only induction into the office recognized by law, assumed the functions and took possession of the office.

5 Am. & Eng. Enc. of Law, 105.
Boardman *vs.* Holliday, 10 Paige, 223, 232.
School District *vs.* Smith, 67 Vt., 568.
People *vs.* Callaghan, 83 Ill., 135.
State *vs.* Callaghan, 61 N. W., 1025.

VII.

THE BONDS AND COUPONS IN QUESTION WERE VOID, IN THAT THEY WERE ISSUED IN VIOLATION OF AND CONTRARY TO THE TERMS OF SECTION 18 OF ARTICLE XI OF THE CONSTITUTION OF CALIFORNIA IN THIS, THAT THE POLLS AT THE ALLEGED ELECTION ON THE QUESTION OF REFUNDING WERE CLOSED ONE HOUR AND FIFTEEN MINUTES BEFORE THE TIME PRESCRIBED BY LAW FOR CLOSING THE SAME, AND BEFORE ONE-HALF OF THE QUALIFIED ELECTORS OF SAID CITY OF SANTA CRUZ HAD VOTED AT SAID ELECTION *(Findings Nos. 6 and 7, Rec., pp. 19-20; Additional Findings No. 2, Rec., pp. 32 to 39; Error No. 49, Rec., pp. 292-3, 295; Error No. 51, Rec., p. 297; Error No. 53, Rec., p. 299; Error No. 61, Rec., p. 301-2).* Specifications, Supra pp 96, 108, 113, 119.

The Constitution of California, Article XI, Section 18, provides that no city "shall incur any indebtedness or "liability, in any manner or for any purpose exceeding "in any year the income and revenue provided for it for "such year, without the assent of two-thirds of the qual- "ified electors thereof, voting at an election to be held "for that purpose. * * * Any indebtedness or liabil- "ity incurred contrary to this provision shall be VOID."

The refunding act of 1893 requires that the question of refunding the outstanding indebtedness of any city availing itself of the provisions of the act shall be submitted to the qualified electors of the city at an election to be held for that purpose; and provides further as follows:

"Said election shall be called and held in the same "manner in which other elections are held in such city "or town. The notice of such election shall recite the "indebtedness to be refunded, together with the denom- "ination, character, time of payment, rate of interest, "as well as all other details of the bonds proposed to be "issued."

The provision for calling city elections is contained in Section 5 of the charter of Santa Cruz (Stats. 1875-6, p. 191; supra, p. 301, and is as follows:

"It shall be the duty of the mayor and common coun- "cil to call all city elections, to designate the time and "place of holding the same—giving at least ten days'

"notice thereof * * * and all provisions of law regu-
"lating elections for State and county officers shall ap-
"ply, as far as practicable, to elections under this char-
"ter. The polls for all elections shall be opened at 9
"o'clock a. m., and shall not be closed until sundown of
"the same day."

It is not claimed that these requirements of the Constitution and statutes of the State were even in substance complied with in the calling and holding of the alleged election upon the question of refunding the outstanding indebtedness of the city of Santa Cruz, and issuing the bonds in question therefor.

The charter of the city expressly provided that "the "polls for all elections shall be open at nine o'clock "a. m., and shall not be closed until sundown of the "same day" (Stats. 1875-6, Sec. 5, p. 191).

But Ordinances Nos. 314-315 provided, with reference to the special election on the question of refunding the indebtedness of the city of Santa Cruz, and issuing bonds therefor, "The polls for such election shall be opened at "sunrise on the morning of the day of election, and shall "close at 5 o'clock p. m. of the same day"—a direct violation of the law; and, as found by the court, "at said "election held on March 13th, 1894, the polls were open-"ed and closed at the hours named in said ordinance" (Original Finding No. 6, pp. 19-20), and in its additional findings of fact, the court, amplifying this finding, says:

"Said ordinance further provided that the notice so "to be published and posted should be substantially in "the words and figures set out in said ordinance, and "should contain, among other things, a recital of the "indebtedness to be refunded, as set forth in the ordi- "nance referred to in Finding No. 5, together with the "denomination, character, time of payment, rate of in- "terest, as well as all other details of the bonds pro- "posed to be issued, and all of which matters were "fully set forth and stated in the Ordinance No. 315 of "said defendant, together with notice that the polls of "such election should be opened at sunrise in the morn- "ing of said day of election, and should close at five "o'clock P. M. of the said day, the said time fixed for "closing the polls being one hour and fifteen minutes "before sunset, and at the said election held on March "13th, 1894, the polls were opened and closed at the "hours named in said ordinance" (Additional Finding No. 2, Tr. of Rec., p. 33).

The court further finds that "less than one-half of "the qualified electors of said defendant voted at said "election" (Additional Finding No. 2, Tr. of Rec., p. 33).

These findings are sustained by the evidence, but as they are unchallenged and therefore conclusive, a reference to the testimony supporting them is unnecessary.

It therefore appears from the findings of fact in the case that no notice of election on the question of re-

funding the bonded indebtedness of the city of Santa Cruz and issuing bonds therefor was ever given as required by the refunding act (Stats 1893, p. 59) and by the charter (Stats. 1875-76, p. 191, Sec. 5), or as provided in Ordinance No. 315, which, being adopted pursuant to the law, and conforming to the laws of the State, had the effect of a statute in determining what notice of election should be given. As we have already shown, the publication of the ordinance, as found by the court, was not a notice of election, although it embodied the form of the notice which the ordinance required to be given, at least in substance, by the city clerk, but so far from advising the people to attend and vote at the special election, the effect of the publication of the ordinance was rather to mislead them, because any elector reading the ordinance, and seeing that it provided for a notice of election to be given by the clerk, might well suppose that unless such notice of election should be given as directed in the ordinance, that there would be no election, notwithstanding the passage of the ordinance.

Again, it appears from the findings of fact made by the court, that before one-half of the qualified electors of the city of Santa Cruz had voted at the so-called special election, the polls were unlawfully closed throughout the city of Santa Cruz one hour and fifteen minutes before the time prescribed by law for the closing of the polls at such election. The refunding act on this point provides that the election on the question

of refunding "shall be called and held in the same man-
"ner in which other elections are held in such city or
"town" (Stats. 1893, p. 59, Sec. 1). The charter of the city provides, "It shall be the duty of the mayor and
"common council to call all city elections, and desig-
"nate the time and place of holding the same—giving
"at least ten days' notice thereof" (Stats. 1875-76, p. 191, Sec. 5). The ordinance providing for notice of the so-called special election upon the question of refunding and issuing the bonds in controversy contained the following provision: "The city clerk is hereby di-
"rected and authorized to cause to be publised in the
"'Santa Cruz Surf' and 'Santa Cruz Daily Sentinel,'
"newspapers printed and published in said city of
"Santa Cruz, in the county of Santa Cruz, for not less
"than ten days before the 13th day of March, 1894, a
"notice of said special election, and to cause to be
"posted at each place of election hereinafter men-
"tioned in said city, a notice of said special election,
"which said notice, so to be posted, shall be substan-
"tially in the words and figures, viz:" (setting forth form of notice of election).

(Additional Finding No. 2, Rec., p. 34.)

Yet the Constitution of California requires as a condition precedent to the contraction of such indebted-
ness by any city "the assent of two-thirds of the quali-
"fied electors thereof voting at an election to be held

" for that purpose" (Constitution of California, Art. XI, Sec. 18); and further in the same section, provides that " any indebtedness or liability incurred contrary to " this provision shall be void." The court will observe that the constitution expressly provides, as above quoted, that the effect of the failing to observe the requirements of Section 18 of Article XI thereof is to render the indebtedness or liability *void*—not invalid if attacked by any person interested, nor voidable at the option of any person or party, but *void*. This constitutional provision is very unusual, and absolutely removes all question and all discretion concerning the matter. Whatever may be the rule of law in other States, applying to bonds issued under like circumstances, but under different constitutional provisions, bonds of a California municipality that are invalid because of a failure to comply with the constituional provisions relating to "the assent of two-thirds of the " qualified electors" of the city issuing the same, "voting at an election to be held for that purpose * * * " shall be void."

The judgment in the case proceeds upon the theory that the bonds, when issued, were invalid. The court below holds them to have been invalid, and expressly adjudges that holders of the bonds ("Northern Counties Investment Company, Limited," Rec., pp. 18-19, 25), having notice of the conditions under which they were issued, are not entitled to recover as against the city of Santa Cruz, but holds that in the absence of knowl-

edge or notice sufficient to put them upon inquiry, innocent purchasers of the bonds are protected by estoppel against the assertion of the facts constituting the invalidity of the bonds; but manifestly no estoppel, by recital or otherwise—no matter how arising—can vivify or give vitality or validity to bonds that, at the time of their issuance, were void under the terms and provision of the constitution of the State.

That the election was invalid upon the facts found by the court concerning the failure to publish notice of the election, as required by the law and the ordinance, and because of the closing of the polls one hour and fifteen minutes before the time prescribed by law for closing them, and before one-half of the qualified electors of the city had voted at the election, seems to us to be unquestionable. But the authorities upon all of these propositions seem to be uniform, and to uphold the rule for which we contend.

Because the election upon the question of refunding the indebtedness of the city of Santa Cruz, evidenced by the bonds and warrants thereof, and issuing bonds therefor, and for all of the essential steps by which the holding and conduct of such election and the notice thereof were provided for, were jurisdictional, the sufficiency or the validity thereof were not matters committed by law to the adjudication of the mayor and common council of the city of Santa Cruz. The mayor and common council of the city of Santa Cruz were authorized by law to determine and certify the result of

the election held; that is to say, to determine the number of votes polled, the number of votes cast in favor of refunding the indebtedness to be refunded, the number of votes cast against the proposition, and whether or not a two-thirds majority of the electors voting at such election had voted in favor of refunding the indebtedness; but the mayor and common council were not authorized nor required to adjudicate or determine the fact that there was or was not an election held upon that question; that the notice of election, if any, was sufficient under the law; nor that the polls were kept open during the hours prescribed by law. Those matters were all jurisdictional; and a failure to comply with the law with respect to any of such matters was an absolutely incurable defect in the proceedings by which the mayor and common council sought to acquire jurisdiction to issue the bonds in question; and such failure, by the express terms of the Constitution of California, rendered the bonds issued upon the authority of such election void, and therefore incurable by any means whatever.

Those provisions of the law which fix the time or place for holding elections are to be construed as mandatory. The general rule is, that if the polls are not kept open for as many hours as the law directs, and if legal voters in numbers sufficient to change the result, or to render it doubtful, are thereby deprived of the privilege of voting, the election must be set aside.

McCrary on Elections (3rd Ed.), Sec. 240.

A considerable deviation from the hours fixed by law for keeping open the polls must render the election void.

Ibid., Sec. 127.

Pa. Dist. Election, 68 Pa. St., 33.

When the polls at an election precinct were not opened until nearly 10 o'clock, and an adjournment was made at noon, etc., the provisions of the law are substantially violated, and the vote of the precinct is void.

Jebbe *vs.* Smith, 108 Cal., 101.

It is the rule that mandatory provisions for the holding of an election must be followed, or the failure will vitiate it.

Ibid., p. 111.

Provisions as to the time and place of holding the election are mandatory.

Atkinson *vs.* Lorbur, 111 Cal., 424.

If the deviation from the legal hours is great, or even considerable, the presumption will be that it has affected the result, and the burden will be upon him who seeks to uphold the election to show affirmatively that it is not.

Sec. 130, McCrary on Elections.

When the order for an election for the issuance of bonds made by the electors of the district, and the notice of election, called for the opening and closing of the polls earlier and later than the time fixed by the statute, and persons were allowed to vote at the election after sunset, the effect of the departure from the statute renders the election nugatory.

Directors F. I. Dist. *vs.* Abila, 106 Cal., 365.

It will be noticed that the refunding act provides that the election shall be called and held in the same manner in which other elections are held in such city or town, and in this connection it has been held that those provisions of the statute which affect the time and place of holding the election are generally of the substance of the election.

McCrary on Elections, Sec. 193.

"If it appear that due notice has not been given, and "that a portion of the electors have been thereby de- "prived of their right to vote, and particularly if the "number thus deprived is sufficient to have changed "the result, if they had voted on one side or the other "—in such a case the election is clearly void."

McCreary on Elections (3rd Ed.), Sec. 144.

The election, therefore, being invalid and void for the reason that the polls were closed an hour and

fifteen minutes before the time prescribed by the charter, thus depriving more than one-half of said qualified electors of an opportunity of expressing their will with reference to the question of refunding the bonded indebtedness of the city, the question now arises: What effect has the void election on the validity of the bonds in controversy here?

It must be conceded that, as to all holders who purchased with notice of the illegality of such election, the bonds are void; but we contend that the void election renders the entire issue of the bonds void, no matter whether the holders thereof be bona fide purchasers for value or otherwise, and that this defect is not cured by any recital contained in the bond. It is true that the bonds themselves recite that they were issued "in pur-"suance of and in conformity with a vote of more than "two-thirds of all the qualified electors of said city of "Santa Cruz, voting at a special election duly and "legally called and held, and conducted in said city, as "provided under said act, on Tuesday, the 13th day of "March, 1894, notice thereof having been duly and "legally given and published in the manner as re-"quired by law, and after the result of such election "had been canvassed, found and declared in the man-"ner and as required by law."

It is undoubtedly the rule, well established, that the municipality is estopped by recitals contained in its bonds from asserting any irregularity in their issuance,

when such recitals are made by officers invested with the authority to determine the question, and when the facts recited do not go to the subject-matter of jurisdiction; but we contend that the doctrine of estoppel has no application here for three reasons:

First. The mayor and city clerk of the city of Santa Cruz are not officers invested by law with the authority to determine the validity or even the result of elections held in the city of Santa Cruz. But if it be held that the bonds are not executed by the mayor and clerk alone, but by the common council as well, because by the adoption of Ordinance No. 320 that body authorized their execution in its name, yet the mayor, common council and city clerk, collectively, have no power to make the recitals contained in the bonds. Such recitals are, therefore, *ultra vires* and void.

Bank of Commerce *vs.* Town of Granada, 10 U. S. App., 692.
Dixon Co. *vs.* Field, 111 U. S., 83, 94.
Sutliff *vs.* Lake Co. Com., 147 U. S., 230.

When a vote of the people is necessary to authorize the issuance of municipal bonds, it is the fact of the assent of the voters, and not the certificate of that fact, which is essential to the grant of authority.

Brown *vs.* Ingalls, 86 Fed. Rep., 261.

Second. Section 18 of Article XI of the constitu-

tion of California reads as follows: "Section 18. No "county, city, town, township, board of education, "or school district, shall incur any indebtedness "or liability in any manner, or for any pur- "pose, exceeding in any year the income and "revenue provided for it for such year, without "the assent of two-thirds of the qualified elec- "tors thereof voting at an election to be held for "that purpose, nor unless before or at the time of in- "curring such indebtedness provision shall be made "for the collection of an annual tax sufficient to pay "the interest on such indebtedness as it falls due, and "also provision to constitute a sinking fund for the "payment of the principal thereof on or before ma- "turity, which shall not exceed forty years from the "time of contracting the same. Any indebtedness or "liability incurred contrary to this provision shall be "void."

The State of California is one of a few States in the Union whose constitutions contain similar inhibitions. Our contention is that no recitals can estop the city from pleading and proving irregularities and informalities in an election held for the purpose of overcoming a constituional inhibition against the incurring of an indebtedness without the assent of a certain proportion of the qualified electors. In such a case, the holding of a valid election and the assent of a sufficient number of the qualified electors are jurisdictional, and

without them the municipality has no authority to proceed further; and any bond issued by the officers of the municipality thereafter is void, regardless of its recitals, for want of power to issue it.

Mr. Simonton, in his valuable work on municipal bonds, states the rule as follws: "When the constitu-
" tion requires that the question be submitted, if not
" done, and the bonds are issued, they are void, and
" there can be no estoppel."

Sec. 67, Simonton on Municipal Bonds.

As was said by Mr. Justice Field in Marsh *vs.* Fulton County, 10 Wall., 676: "It is a case where the power
" to contract never existed—where the instruments
" might, with equal authority, have been issued by any
" other citizen of the county. It was a case, too, where
" the holder was bound to look to the action of the offi-
" cers of the county, and ascertain whether the law
" had been so far followed by them as to justify the
" issue of the bonds. The authority to contract must
" exist before any protection as an innocent purchaser
" can be claimed by the holder. This is the law, even
" as respects commercial paper alleged to have been
" issued under delegated authority, and as stated in the
" case of Floyd Acceptances."

In March County *vs.* Cook, 38 Ill., 45, it appeared that the election was ordered by the county court, when it should have been ordered by the board of

supervisors. The vote was in the affirmative. The supervisors issued the bonds. It further appeared that for a number of years the county raised and paid the annual interest of $6,000 on the bonds, and also that the county voted yearly on the stock it received. The court held the bonds in suit void, because of a want of power, holding that, as the election was not called by the proper officers, there was, in fact, no election under the statute. That it was the duty of the purchaser to examine the record, and had he done so, he would have ascertained that the election had been called by the wrong body.

It will be noticed that the section of the constitution referred to declares emphatically that any indebtedness or liability incurred contrary to its provisions SHALL BE VOID. It is the well established doctrine that when the statute or provision of the constitution authorizing the issue of the bonds declares in express terms that unless the conditions precedent are performed, the bonds shall not be issued or shall not be binding obligations; such bonds, if issued, and the conditions necessary to be performed prior to their issue are not in fact performed, *are void*, in the hands of even a bona fide holder, notwithstanding any recitals.

"Bonds issued under such statutes are not valid and "binding because of the express provision of the stat- "ute, of which, of course, all persons are bound to take "notice; and until the conditions are performed, the

"municipality has not the power to issue the bonds,
"and if it should, without the performance of the con-
"ditions imposed by the statute, there is a want of
"power to issue, and as a want of power is a good de-
"fense against a bona fide holder, notwithstanding
"any recitals in the bonds, such bonds are void."

Simonton on Municipal Bonds, Sec. 253.

The same author further says: "We are of the opin-
"ion that when a vote is a necessary prior condition to
"the issuing of bonds or the incurring of a debt, that
"if no vote is taken, no election in fact held, that the
"municipal authorities have no power to make the
"issue or incur the debt, and that in such a case the
"corporation should not be estopped to set up the omis-
"sion as a defense. The acts of the corporation in issu-
"ing the bonds should be held to be *ultra vires*."

Ibid., Sec. 202.

This doctrine has been upheld by the courts of many States, and seems to be founded on principle and authority.

Stein *vs.* Franklin Co., 48 Mo., 167.
Carpenter *vs.* Lathrop, 51 Mo., 483.
Cagwin *vs.* Town of Hancock, 84 N. Y., 532.
Craig *vs.* Town of Andes, 93 N. Y., 405.
Ontario *vs.* Hill, 99 N. Y., 324.

In the case of Hedges *vs.* Dixon County, 150 U. S., 187, the Supreme Court said: "Recitals in bonds issued "under legislative authority may estop the municipal- "ity from disputing their authority as against a bona fide holder "for value, but when the municipal bonds are issued "in violation of a constitutional provision, no such es- "toppel can arise by reason of any recitals in the "bonds."

In the case of Quaker City *vs.* Nolan, 59 Fed. Rep., 660, in a suit brought on bonds which recited that they were issued pursuant to the enabling statutes, which were referred to by title and date of approval, but contained no other recital, the defense was that no sinking fund had been provided when the bonds were issued, as required by the Constitution of Texas, the court held the bonds to be void for this reason, and said, incidentally, that no recital would estop the municipality from pleading the non-performance of the constitutional provision.

It will be observed in this case the constitution made void all debts if the provision was not complied with—in that respect being identical with the provision of the Constitution of California above quoted.

The Constitution of Idaho, Art. VII, Sec. 3, provides that "no county shall incur any indebtedness or liabil- "ity in any manner or for any purpose exceeding in "that year the income and revenue provided for it for "said year, without the assent of two-thirds of the

"qualified electors thereof voting at an election to be "held for that purpose."

In the case of Bannock County *vs.* Bunting & Co., 37 Pac. Rep., 277, the Supreme Court of Idaho decided that, without such a vote, the county could not issue bonds, the amount of which exceeded such income, though the purpose of the issue of the bonds was to pay existing indebtedness.

Third. In that portion of our brief which bears on the question of the want of power of the city of Santa Cruz to issue bonds for the purpose of refunding the mortgage bonds of a private corporation, we had occasion to mention the rule of law that recitals cannot be relied upon as an estoppel where the facts recited are matters of public record, and are open to the inspection of every one who is disposed to make inquiry, and we there cited, as authorities, Sutliff *vs.* Lake County Commissioners, 144 U. S., 230; Northern Bank of Toledo *vs.* Porter Township Trustees, 110 U. S., 608, and other cases. We respectfully insist that the same rule of law has application here, in that the statute of 1893, under which the refunding bonds were issued, or attempted to be issued, provides that the common council shall give notice of the election called for the purpose of determining the question of refunding such indebtedness, and that such notice shall recite the indebtedness to be refunded, etc. This notice became a matter of record to which all persons were referred,

and it would have been an easy matter for any intending purchaser of bonds to have ascertained, by examination of this record, that the election so called must have been illegal and void, in that the notice provided for by the said common council declared in express terms that the polls should be closed at 5 o'clock P. M., which was an hour and fifteen minutes before the legal time of closing the polls.

People *vs.* H. W. Seale, 52 Cal., 71.

VIII.

THE BONDS AND COUPONS IN QUESTION WERE NOT DELIVERED TO PLAINTIFF, NOR TO ANY OF HIS ASSIGNORS, BY THE OFFICERS OF THE CITY OF SANTA CRUZ *(Findings 8, 9, 10, 11, Rec., pp. 20 to 23; Error No. 52, Rec., p. 298; Error No. 56, p. 300).* Specifications, Supra pp. 109, 116.

In the execution of negotiable instruments, something more is necessary than their mere signing by proper officials or persons; there must be delivery.

Germania Savings Bank *vs.* Village of Suspension Bridge, 73 Hun., 590.

In the case just cited, Mr. Justice Dykman, in delivering the opinion of the Court, said: "It may be stated as "a general proposition of law that delivery is essential "to the validity of all written instruments. Promissory "notes, bills of exchange, and bonds, are all included in

"that general rule of law. The mere act of signing a "note or bond, and retaining it in the hands of the "maker, forms no contract. Before the instrument can "be operative, there must be a delivery as an evidence "of a subsisting debt, and until such delivery the paper "has no legal inception, and is inoperative. The fore- "going principle applied to this case seems to be decisive "of the appeal. These bonds never had a valid incep- "tion. They were stolen before delivery, and so were "destitute of that essential element of validity; they "were neither property nor the subject of ownership."

In Mercer County *vs.* Providence Life Ins. & Trust Co., 43 U. S. App., 21, certain county bonds were held void because issued without authority of law, the law requiring that they should be issued only when a certain railroad had been built through the county. The bonds were executed by the county authorities, and placed in escrow with a selected trustee, whose duty it was to deliver the bonds to the railroad corporation when the railroad had been built through the county. The railroad was built into the county, and to within two miles of the opposite boundary, and there connected with another line. Thereupon, the trustee delivered the bonds to the railroad company, and, in the course of time, they were placed upon the market, and went into the hands of innocent purchasers for value who had no notice of the non-performance of the condition precedent. In an elaborate and carefully prepared opinion, the court held that the

bonds were void, and that recitals cannot possibly operate as to a fact occurring after the execution of the bonds and before delivery, and that delivery is just as essential to the existence of a bond as it is to a deed.

To the same effect is the case of Citizens Saving & Loan Association *vs.* Perry Co., 156 U. S., 692. In that case the qualified voters of Perry county, Illinois, voted to subscribe to the capital stock of the Belleville & Southern Illinois Railroad, and to issue its bonds in payment thereof, conditioned that "no bonds should be issued or "stock subscribed until the railroad company should "locate their machine shops at Duquoin." In December, 1870, the county court directed the bonds to be issued, and they were issued, duly executed and delivered to the company, and by it put into circulation. But the shops were never located at Duquoin. It was held that the county court, by its order to issue the bonds, and the county officers, by issuing them, violated their duty as prescribed by the statutes; and as the bonds contained no recital precluding inquiry as to the performance of the condition upon which the people voted in favor of their issue, it was open to the county to show that it had not been performed, which, being shown, the bonds became subject to the provisions of the constitution, and were invalid.

It has been held that municipal bonds duly executed by the proper officers of a municipality, may be valid in the hands of innocent purchasers for value before apparent maturity, even though the bonds were stolen

from the municipal treasury, and never either sold or otherwise issued or delivered by the municipal authorities. But it will be found that in such cases the city has had full power and authority, without any legal limitation, restriction, or condition whatever, to issue negotiable bonds. Where such ample, unrestricted power exists, the equitable principle that where one of two innocent parties must suffer through the wrongful act of another, the burden must be borne by the party through whose act or negligence the wrong-doer was enabled to perpetrate the fraud. But the rule of the authorities mentioned has no application to municipal bonds which are required by law to be issued by the municipality in a particular way or upon particular conditions, or subject to limitations such as are imposed by the laws of California, and particularly by the act of March 1, 1893 (Stats. 1893, p. 59), namely, that they must be sold in the manner prescribed by the common council, and must be sold to the highest bidder, and must be sold for not less than their face value in United States gold coin, and that the selling price must be paid into the treasury of the city.

The findings of fact in this case show that none of these conditions were complied with in the alleged sale and delivery of the bonds in question, and that their pretended delivery was procured by the fraud of Walter Stanton, and that the persons making the delivery were not officers of the city of Santa Cruz (Rec., pp. 20-1, 22-24).

If the law imposes no limitation upon the right of a municipal corporation to issue bonds, the purchaser has nothing to inquire about save and except that the signatures to the bonds are genuine, that the persons signing were the officers of the city as represented, that the officer signing the bonds had power under the law to determine the questions of law and fact recited in the bonds as having occurred and having been complied with; but where limitations upon the right of the city to issue bonds, and upon the right and power of the officers to sell and to deliver the bonds, are imposed by statute, the bonds can have no validity unless the conditions and limitations imposed by law have been fulfilled and complied with, and the statute places all purchasers of such bonds upon inquiry as to the performance of such conditions and the observance of such limitations.

IX.

THE CIRCUIT COURT ERRED, TO THE PREJUDICE OF DEFENDANT, IN REFUSING, WHEN REQUESTED BY DEFENDANT, TO MAKE CERTAIN ADDITIONAL FINDINGS OF FACT, HEREINAFTER, IN THE DISCUSSION OF THIS POINT, SPECIFIED.

1.

That the circuit court erred in failing to make the additional finding set forth in Specification of Error No. IV (supra, p. 52) sufficiently appears from the testimony referred to in that specification.

The fraudulent procurement and appropriation of the bonds in question were duly pleaded as a substantial portion of the defense of the plaintiff in error in the court below (See answer of defendant, Rec., p. 17, par. II). It was denied by operation of law under the laws of California relating to pleading and procedure in actions at law, and the evidence not only supports the finding requested, but the finding requested is supported by all the evidence, and there is no evidence to the contrary. The evidence upon this subject is that Walter Stanton procured said bonds and coupons, and all of them, from the city clerk of the city of Santa Cruz (Rec., pp. 148-9), contrary to law, without the payment of any consideration therefor, and upon an illegal and unauthorized contract (Set forth on pp. 65-6 of the Record). That said Walter Stanton immediately after obtaining the bonds and coupons in question, viz: on the 24th day of April, 1894, left the city of San Cruz with the entire refunding bond issue in his possession (Rec., pp. 149, 204). That thereafter, in June, 1894, said Stanton was at the Occidental Hotel, in San Francisco, California, and there requested Robert Effey, the then mayor of the city of Santa Cruz, to bring the original contract under which the said Walter Stanton procured the said refunding bonds, including the bonds and coupons in question, to San Francisco, to be shown to him, Walter Stanton. That said Stanton had the document in his possession for a few hours, "may be over night." That Stanton finally returned the document to said

Effey, who returned it to the files in the office of the city clerk of the city of Santa Cruz (Rec., p. 204). That when said contract was next examined, it was discovered that the same had been forged and counterfeited by the extraction of one of the pages therefrom and the substitution of another page in its stead (Rec., pp. 193-4, 203-4, 205, 206-7). That the change made in said contract was a material change in the interest of the firm of Coffin & Stanton, and against the interest of the city of Santa Cruz, and in legal effect changed the contract from one of agency on the part of Coffin & Stanton for the sale of the refunding bonds for account of the city of Santa Cruz and the application of the proceeds to certain specified purposes, to an absolute sale of the bonds to said Coffin & Stanton by the city of Santa Cruz (See original instrument and forgery thereof, Rec., 193-4 and 206-7). All of the evidence in the case upon the subject indicates that said contract was mutilated and changed by said Walter Stanton during the time that he had it in his possesison in San Francisco, in June, 1894.

The findings show that Stanton received the bonds in question on April 24, 1894 (Finding No. 11, p. 23). The People's Trust Company purchased one of the bonds September 1, 1894 (Rec., p. 91). The International Trust Company of Boston received twelve of the bonds as collateral security for a $50,000 note of the firm of Coffin & Stanton, June 20, 1894 (Rec., p. 176). The Chapman National Bank received seven of the bonds as

collateral security for a note of that firm, May 8, 1894 (Rec., p. 94). The Wakefield Trust Company received one of said bonds as collateral security for a note of Coffin & Stanton in July, 1894 (Rec., p. 95). The National Bank of the Republic, Boston, Mass., received ten of the bonds as collateral security for a note of Coffin & Stanton June 7, 1894 (Rec., p. 98). E. G. & E. Wallace purchased 150 of the bonds from Coffin & Stanton in September, 1894 (Rec., pp. 99 to 102), the proceeds of which, as of all the other bonds sold, were appropriated by Coffin & Stanton to their own use, and no part thereof was ever paid to the city of Santa Cruz (Testimony of Williams, Rec., p. 48). The First National Bank of Worcester, Mass., received from Coffin & Stanton twenty-two of said bonds on July 20, 1894, as collateral security for a note of that firm (Rec., p. 102). The First National Bank of Hagerstown, Md., on July 18th, 1894, received from Coffin & Stanton six of said bonds as collateral security for a note of that firm (Rec., pp. 104 to 106). The Albany City National Bank, on July 25, 1894, received eleven of said bonds from Coffin & Stanton as collateral security for a note of that firm (Rec., pp. 106. The South Norwalk Savings Bank received eleven of said bonds from Coffin & Stanton on July 26, 1894, as collateral security for a note of that firm (Rec., p. 109). The Bank of Skaneatles received seven of said bonds from Coffin & Stanton on Jule 7, 1894, as collateral security for a note of that firm (Rec., p. 210). The Farmers' National Bank received four of

said bonds from Coffin & Stanton in June, 1894, as collateral security for a note of that firm (Rec., p. 113). The Kenduskeag National Bank received twelve of said bonds from Coffin & Stanton on May 29, 1894, as collateral security for a note of that firm (Rec., p. 114). The National Bank of Waterville received one of said bonds from Coffin & Stanton on May 3, 1894, as collateral security for the payment of a note of said firm (Rec., p. 118). The First National Bank of Webster, Mass., received one of said bonds from Coffin & Stanton on May 3, 1894, as collateral security for a note of that firm (Rec., pp. 121-2). Martin's Bank, Limited, of London, received from Coffin & Stanton, on May 28, 1894, eight of said bonds as collateral security for a note executed by said firm (Rec., pp. 123 to 128). The Northern Counties Investment Trust Company received from Coffin & Stanton three of said bonds in September, 1894, as collateral security for a note of said firm (Rec., pp. 128-9).

The testimony further shows that neither said Stanton nor said Coffin & Stanton ever made any return of money or other proceeds obtained for or upon any of said bonds (Testimony of Charles E. Williams, Rec., p. 218).

The foregoing testimony, none of which is contradicted or questioned, shows the method pursued by Coffin & Stanton in disposing of the bonds and appropriating the proceeds thereof at the earliest moment possible after receiving the same from the city of Santa

Cruz; and shows not only the immediate sale and hypothecation thereof for the benefit of the firm, but that the purpose so to dispose of them and appropriate the proceeds was present in the minds of Coffin & Stanton at the time of receiving the bonds.

The finding above requested is, we think, supported by the evidence, and should have been made, because it is material as showing that, under the laws of California, the act of Coffin & Stanton in obtaining possession of the bonds, with the felonious intent to deprive the city of Santa Cruz of the bonds and their proceeds, to sell them and hypothecate them for their own use, established the charge made in our answer that said bonds were stolen from the city of Santa Cruz.

People *vs.* Smallman, 55 Cal., 185.
People vs. Shaughnessy, 110 Cal., 598.

A municipality is not liable for stolen bonds in the hands of a bona fide purchaser for value.

German Savings Bank *vs.* Village of Suspension Bridge, 73 Hun. (N. Y.), 590.

2.

The court erred in refusing to make the finding of fact set forth in Specification of Error No. V (supra, p. 53), for the reason and upon the evidence set forth in the discussion of the last point, and the evidence set

forth and referred to in said Specification of Error No. V.

3.

The Court erred in refusing to make the finding of fact set forth in the Specification of Error No. VI (supra, p. 54), for all of the reasons and upon the evidence specified in our discussion of Specification of Error No. IV, and by reason of the evidence cited and referred to in said Specification of Error No. VI.

4.

The court erred in refusing to make the additional finding of fact set forth in Specification of Error No. VII (supra, pp. 54 to 59), for the reasons set forth in said specification, because it appears from the findings of fact and from the statutes of California, of which this Court takes judicial notice (Findings 1, 2 and 3, Rec., pp. 19 to 23 and 26 to 41), that the bonds and coupons in question, and each and all thereof, constituted an issue in excess of the limitation imposed by law upon the contraction of indebtedness by the city of Santa Cruz; and the findings further show that the evidence that said bonds did constitute an over-issue was matter of public record required by law to be kept by the officers of the city of Santa Cruz, and, as such, was open to the inspection of all intending purchasers of such bonds, and to the whole world.

(Statutes involved, supra, Sec. 9, p. 33; Secs. 10 and

15, pp. 34-5; Sec. 40, p. 35. Findings Nos. 5, 6, 7, 10, Rec., pp. 19 to 23; Additional Findings Nos. 1 and 2, Rec., pp. 26 to 39.)

5.

The court erred in refusing to make the additional finding of fact set forth in Specification of Error No. VIII (supra, p. 60), for the reasons stated in said specification.

The refusal of a trial court finding the facts and conclusions of law to find every fact material to its conclusion, if properly excepted to, is ground of reversal.

The E. A. Packer *vs.* N. J. Lighterage Co., 140 U. S., 360.

X.

THE CIRCUIT COURT ERRED, TO THE PREJUDICE OF DEFENDANT, IN MAKING CERTAIN FINDINGS OF FACT, CONTRARY TO ALL OF THE EVIDENCE, AS HEREINAFTER IN THE DISCUSSION OF THIS POINT SPECIFIED.

1.

The court erred in making, at the suggestion of plaintiff, the additional finding of fact set forth in Specification of Error No. IX (supra, pp. 61 to 64), for the reasons set forth in said specification.

2.

The court erred in making, at the suggestion of plaintiff, the finding of fact set forth in Specification of Error No. X (supra, p. 65), for the reasons set forth in said specification, because said finding, in its essential part, namely: that F. H. Prince & Co. employed Dickinson, on their own account and for themselves and not acting as agents of E. G. & E. Wallace, to give his opinion in relation to the validity of such bonds, is contrary to all of the evidence, and the whole thereof, on the subject of the employment of said Dickinson to render an opinion on the question of the validity of said bonds, consisting of the testimony of Mr. Sumner Wallace (Rec., pp. 99 to 102) and Mr. F. H. Prince (Rec., pp. 245 to 251).

3.

The court erred in making the findings set forth in Specification of Error No. XI (supra, p. 66), for the reasons set forth in said specification, and because said finding is contrary to all of the evidence on the subject in the case, as shown by the testimony referred to and cited in said specification.

4.

The court erred in making the portion of Original Finding No. 8, set forth in Specification of Error No. XII (supra, pp. 66-8), upon the grounds and for the reasons stated in said specification.

5.

The court erred in making that portion of Finding of Fact No. 12 which is set forth in Specification of Error No. XIII (supra, p. 68), for the reasons set forth in said specification at (supra, pp. 68 to 81), and in Specification of Error No. XIV at (supra, pp. 81-4).

6.

The court erred in making that portion of Finding of Fact No. 12 set forth in Specification of Error No. XV, for the reasons set forth in said specification (supra, p. 84).

7.

The Court erred in making that portion of Finding of Fact No. 12 which is set forth in Specification of Error No. XVI (supra, p. 85), for the reasons set forth in said specification (supra, pp. 85-7).

XI.

THE CIRCUIT COURT ERRED, TO THE PREJUDICE OF DEFENDANT, IN FAILING TO DETERMINE CERTAIN MATERIAL ISSUES OF FACT RAISED BY THE PLEADINGS, AS HEREINAFTER, IN THE DISCUSSION OF THIS POINT, SPECIFIED, AND IN RENDERING JUDGMENT AGAINST DEFENDANT ON INSUFFICIENT FINDINGS. *(Assignments of Error No. 51, Rec., p. 297; No. 52, Rec., p. 300; No. 56, Rec., p. 300; No. 57, p. 300; No. 59, Rec., p. 301.)*

Specifications,
Supra pp. 87 to 92.

1.

The court erred in failing to make any finding of fact on the issue joined by defendant's answer, as set forth in Specification of Error No. XVII (supra, pp. 87-8), for the reasons set forth in said specification upon said pages.

2.

The court erred in failing to make any finding of fact on the issue set forth in Specification of Error No. XX (supra, pp. 89-90), for the reasons set forth in said specification.

3.

The court erred in failing to make any finding of fact on the issue set forth in Specification of Error No. XXI, for the reasons set forth in said specification (supra, p.

4.

The court erred in failing to make any finding of fact on the issue set forth in Specification of Error No. XXII (supra, p. 91).

5.

The court erred in failing to make any finding of fact on the issue set forth in Specification of Error No. XXIII (supra, p. 91), for the reasons set forth in said specification.

6.

The court erred in failing to make any finding of fact

on the issues set forth in Specification of Error No. XXIV (supra, pp. 91-2).

7.

The court erred in failing to make any finding of fact on the issue set forth in Specification of Error No. XXV (supra, p. 92), for the reasons set forth in said specification.

The court in this case made special findings of fact, and should, therefore, have specifically determined every material issue of fact presented by the pleadings.

Baggs *vs.* Smith, 53 Cal., 88-90.
Shaw *vs.* Wandesforde, 53 Cal., 300.
Taylor *vs.* Reynolds, 53 Cal., 686-9.
O'Connor *vs.* Frasher, 53 Cal., 435-6.
Knight *vs.* Roche, 56 Cal., 25.

This is the unquestionable rule in the State courts, under statutes providing for findings of fact in an action at law tried by the court without a jury, and, while the finding of a United States circuit court in such a case may be general—for the plaintiff or for the defendant—and not subject to review for insufficiency; yet, if the findings be special, as in this case, they must respond to and cover all of the material issues made by the pleadings.

The E. A. Packer *vs.* New Jersey Lighterage Co., 140 U. S., 360.

The findings required by the statute, when stated by the Court, are "part of the record, without any action "of the parties; and errors of law arising on them need "not be presented by bill of exceptions."

Nickerson *vs.* Merchants SS. Co. of Charleston, 105 U. S., 267.

Where the findings are special, this Court may review the sufficiency of the facts found by the trial court to support the judgment.

Mercantile Mutual Ins. Co. *vs.* Folsom, 18 Wall., 237.

Boardman *vs.* Toffey, 117 U. S., 271.

On trial by the court without a jury, in an action at law, the sufficiency of the findings, if special, to support the judgment, may be considered by this Court.

Ryan *vs.* Carter, 93 U. S., 78.

Jennison *vs.* Leonard, 21 Wall., 302.

Brooklyn Life Ins. Co. *vs.* Miller, 12 Wall., 285.

The findings of the court below are to be considered in this Court in connection with the pleadings.

O'Reilly *vs.* Campbell, 116 U. S., 418.

Special findings "are in the nature of a special ver- "dict, as to which the inquiry is always open in the re-

"viewing court, whether, when taken in connection "with everything else that appears, it is sufficient to "support the judgment."

Nickerson *vs.* Merchants' Steamship Co., 105 U. S., 267.

Evans *vs.* Kister, 92 Fed., 832, and cases cited.

Tested by this rule, the failure of the court to find upon the issues raised by the defendant's answer, as to the larcenous taking of the bonds from the city of Santa Cruz (Fourth Defense, Ans. I, Rec., p. 15; Specification of Error No. XXIII, supra, p. 91); and as to their fraudulent taking (Ans., Sixth Defense II, Rec., p. 17; Specification of Error No. XXVI, supra, pp. 92-3), renders the findings insufficient to support the judgment; because, if all the facts found by the circuit court be conceded, plaintiff (petitioner here) was not entitled to judgment if it be also true, as alleged in the answer, that Walter Stanton either fraudulently or larcenously took the bonds from the city of Santa Cruz.

Reading the findings in connection with the pleadings, we have this result: Plaintiff alleges (Rec., p. 6) that all of the bonds and coupons in question were sold and delivered by the city of Santa Cruz to Walter Stanton, and that Walter Stanton sold and delivered them to him. The court finds that "all of said bonds and "coupons were assigned to plaintiff for collection only" (Rec., p. 19).

The court finds that "all of the bonds and coupons "referred to in the amended complaint were, prior to "the commencement of this action, duly assigned to "plaintiff" (Rec., p. 18); that three of said coupons were assigned to plaintiff by the Northern Counties Investment Trust Company (Rec., p. 18), and that 150 bonds and coupons were assigned to plaintiff by the firm of E. G. & E. Wallace (Rec., p. 24), but does not find the number of bonds or coupons assigned to plaintiff for collection by Walter Stanton, as alleged in the complaint (Rec., p. 6), or by the firm of Coffin & Stanton.

All of the bonds and coupons in question have been traced into the hands of Coffin and Stanton by the findings (Rec., p. 23), and, as only 153 thereof have been traced out of their hands, the fair presumption, if any presumption can be indulged, is that the remaining 129 bonds and coupons were assigned to plaintiff for collection, especially as he alleges that they were all sold and delivered to him by Walter Stanton (Rec., p. 6).

Certainly, Walter Stanton could not, and the firm of Coffin & Stanton could not, either directly or through an assignee "for collection only," recover from the city of Santa Cruz, on the bonds and coupons in question, if it appeared, as alleged in the answer, that Walter Stanton stole the bonds, or fraudulently took them from the city; and as it does not appear from the record what portion, if any, of the judgment is based upon bonds or coupons assigned to plaintiff by Coffin and

Stanton, or by Walter Stanton, for collection only, the judgment of the circuit court was erroneous on that ground.

It further appears that the findings are insufficient to support the judgment of the circuit court, because it appears therefrom that Coffin & Stanton obtained all of the bonds in question from the city of Santa Cruz unlawfully and without consideration (Rec., pp. 22-4); that plaintiff is an assignee of said bonds, without valuable consideration, "for collection only" (Rec., p. 18), and, as to at least 129 of said bonds and coupons, it does not appear that they or any of them were, or was, ever purchased or held by any innocent purchaser or holder for value, or for any consideration whatever, and the Court below has expressly found and declared that all of the bonds and coupons are invalid except in the hands of innocent purchasers for value, without notice of any fact tending to show invalidity (Rec., pp. 18-20, 22-3, 25, 52).

In addition to this, the circuit court, in its opinion, referring to the agreement under which the bonds were delivered to Coffin and Stanton, says: "Certainly, the "delivery of the bonds under such an agreement was a "gross violation of the statute" (Rec., p. 59).

XII.

THE CIRCUIT COURT ERRED IN OVERRULING DEFENDANT'S DEMURRER TO THE AMENDED COMPLAINT HEREIN, AND IN RENDERING JUDGMENT AGAINST THE DEFENDANT, BECAUSE IT DOES NOT APPEAR FROM SAID COMPLAINT, NOR FROM THE RECORD HEREIN, THAT THE COURT HAD JURISDICTION OF THE ACTION.

It appears upon the face of the complaint (Rec., p. 6) that the bonds and coupons in question were originally sold and delivered to one Walter Stanton, who afterwards sold the same to the plaintiff herein, and it does not appear from the complaint that the original payee of said bonds could have maintained an action thereon in the United States circuit court. It further appears from the findings of fact herein that the bonds and coupons in question were, before the commencement of the action, assigned to plaintiff, and that "the plaintiff did "not pay any money consideration for the assignment "to him of any of said bonds or coupons, but all of said "bonds or coupons were assigned to plaintiff for collec-"tion only" (Findings 1 and 2, Rec., p. 18).

It further appears from said findings that more than 153 of the bonds and coupons in question were assigned to plaintiff for collection by persons other than Walter Stanton, the original payee of said bonds (Findings 3 and 12, Rec., pp. 18-19, 24), and it does not appear from the record herein that said assignors of plaintiff, or any

of them, could have maintained an action in the United States circuit court on said bonds or coupons, or any of them.

"Where the jurisdiction is founded only on the fact " that the action is between citizens of different States, " suit shall be brought only in the district of either the " plaintiff or the defendant; nor shall any circuit or dis- " trict court have cognizance of any suit, except upon " foreign bills of exchange, to recover the contents of any " promissory note or other chose in action, in favor of " any assignee, or of any subsequent holder, if such in- " strument be payable to bearer and be not made by any " corporation, unless such suit might have been prose- " cuted in such court to recover the said contents if no " assignment or transfer had been made."

> Act of March 3, 1887, c. 373, 24 Stat. 552, as corrected by the Act of Aug. 13, 1888, c. 866, 25 Stat. 433, defining the jurisdiction of the district and circuit courts of the United States.

"A question of jurisdiction cannot be waived."

> Mexican N. R. R. *vs.* Davidson, 157 U. S., 208.
> Metcalf *vs.* Watertown, 128 U. S., 586.
> Mansfield Ry. Co. *vs.* Swan, 111 U. S., 379.
> Capron *vs.* Van Worden, 2 Cranch., 126.

"Whether that court had or had not jurisdiction, is a " question which we must examine and determine, even

"if the parties forbear to make it, or consent that the "case be considered upon its merits."

Metcalf *vs.* Watertown, 128 U. S., 587.

"According to the uniform decisions of this court, the "jurisdiction of the circuit court fails unless the neces- "sary citizenship affirmatively appears in the pleadings "or elsewhere in the record."

Mansfield Ry. Co. *vs.* Swan, 111 U. S., 382.

"If the citizenship of the original payee is material to "the jurisdiction of the court, it is essential to plain- "tiff's case to make it affirmatively appear upon the "record. Parker *vs.* Ormsby, 141 U. S., 81; 11 Sup. "Ct. Rep., 912, and cases there cited not so appearing, "it is proper to discuss the case, *sub lite*, as if it did ap- "pear that the original parties to the note, for whose "contents this suit is brought, were, at the time of bring- "ing the action, citizens of the same State."

U. S. Nat. Bk. *vs.* McNair, 56 Fed. Rep., 324.

"The term 'chose in action' is one of comprehensive im- "port. It includes the infinite variety of contracts, cov- "enants and promises which confer on one party a right "to recover a personal chattel or a sum of money from "another by action."

Sheldon *vs.* Sill, 8 How., 449.
Mex. Nat. R. R. *vs.* Davidson, 157 U. S., 206.

"We do not think that the words 'if such instrument
" 'be payable to bearer and be not made by any corpora-
" 'tion' limit the comprehensiveness of 'chose in action'
" as construed under the act of 1789; and as this cause
" of action is based on contract, we are of opinion that it
" is within the definition heretofore ascribed to the words
" 'to recover the contents of a chose in action.' This
" being so, it follows that the action could not have orig-
" inally been brought in the circuit court of the United
" States by Davidson, the assignee of a Colorado corpora-
" tion, against a Colorado corporation."

Mex. Nat. R. R. *vs.* Davidson, 157 U. S., 206-7.

If it be suggested that the holder of a negotiable instrument payable to bearer has a right to sue the maker in the United States circuit court, regardless of the citizenship of former holders, because his title does not come to him by assignment, but by a direct contract with the maker (Town of Thompson *vs.* Perrine, 106 U. S., 589-92), we answer that plaintiff (petitioner) is not within that rule, because the findings show that his title rest upon an assignment "for collection only" (Rec., p. 34).

The rule in Perrine's case, above stated, has, we think, been abrogated by the amendments to the statute (Acts of March 3, 1887, and Aug. 13, 1888), but, assuming it to be still in force, plaintiff (petitioner) is not within it, because his complaint and the findings, above cited, show

that he is a mere assignee of a chose in action, for collection only.

We submit that the decision of the circuit court of appeals, reversing the judgment of the circuit court, should be affirmed, upon the ground and for the reason stated in the prevailing opinion of that court.

And we further submit that, if this Court should hold the views expressed in the prevailing opinion of the circuit court of appeals to be erroneous, yet the judgment of the circuit court should be reversed upon the other points discussed in this brief, all of which were presented to and argued before the circuit court of appeals, but not considered or decided by that court, for the reasons stated in its opinion (Rec., p. 315).

Respectfully submitted,

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No. 248

Brf. of Sullivan as Amicus Curiae

Office Supreme Court U.S.
APR
JAMES H. M

Filed April 22, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 248.

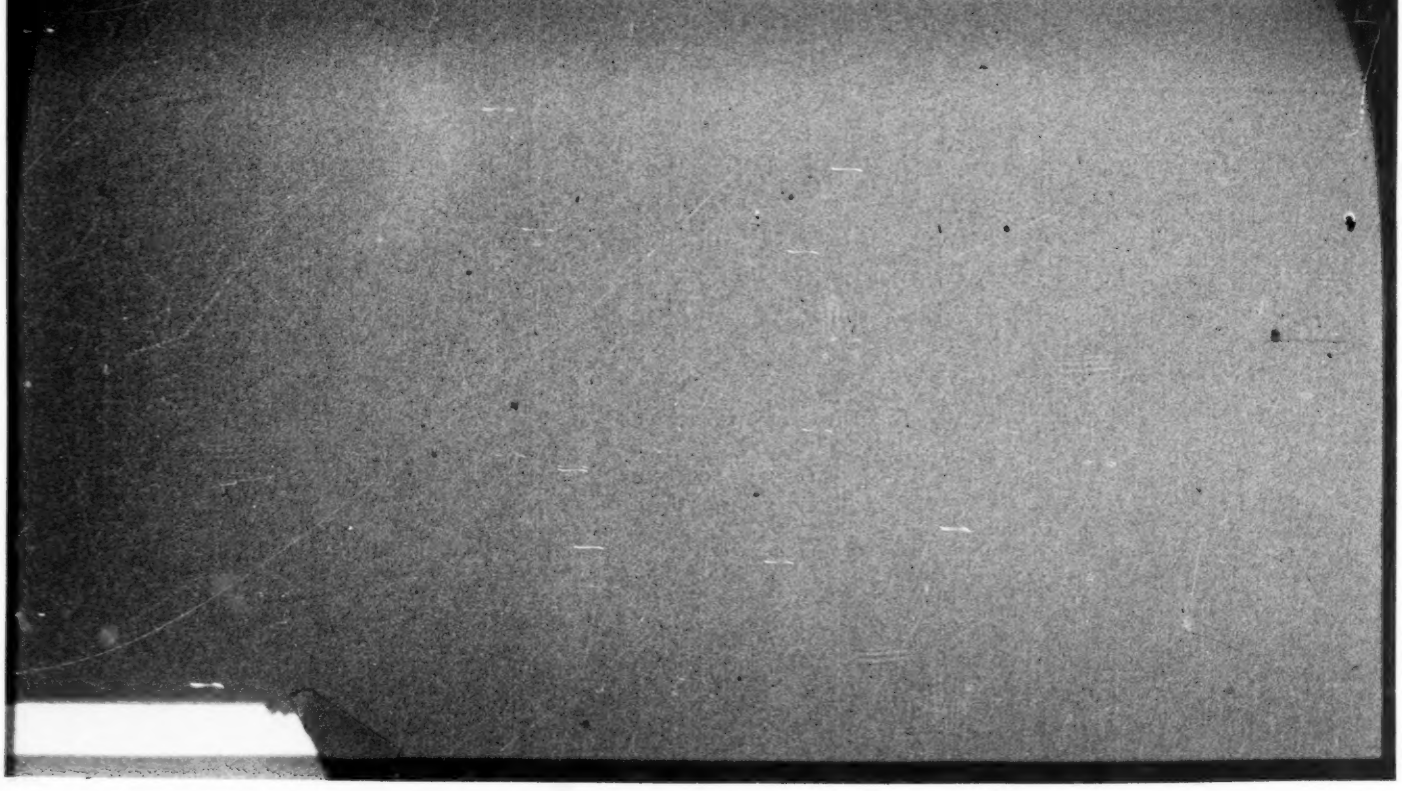
ALBERT H. WAITE, PETITIONER,

vs.

THE CITY OF SANTA CRUZ.

BRIEF OF FRANK J. SULLIVAN, AMICUS CURIÆ.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 4-12-'01



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FACTS.

The facts of the case are clearly stated in the opinion of Justice De Haven, 89 Fed. Rep., pages 620 to 623, as follows:

"This is an action at law to recover the sum of $23,100, claimed to be due on 9 refunding bonds and 282 interest coupons of $50 each, attached to the bonds sued on and other refunding bonds, alleged to have been issued by the defendant on the 16th day of April, 1894, payable on April 15, 1895. The action necessarily involves questions relating to the validity of 360 refunding bonds of $1,000 each, purporting to have been issued by the defendant on the 16th day of April, 1894. The circumstances under which these bonds were issued may be briefly stated as follows: On February 26, 1894, the defendant, City of Santa Cruz, had an outstanding bonded indebtedness of $271,000, or thereabouts,

and was also the owner of certain water works and necessary appurtenances thereto, including land, water rights, etc., theretofore purchased by it from the City Water Company of Santa Cruz, a private corporation. The water works and appurtenant property were subject to a mortgage, which had been placed thereon by the City Water Company of Santa Cruz for the purpose of securing an outstanding bonded indebtedness of that corporation in the sum of $89,000, and interest thereon; and on that day the common council of the defendant city, deeming it to be for the best interest of the defendant to refund its bonded indebtedness under the provisions of an act of the legislature of the State of California entitled 'An act to amend an act entitled "An act to authorize the common council, board of trustees, or other governing body of any incorporated city or town, other than cities of the first class, to refund its indebtedness, issue bonds therefor, and provide for the payment of the same," approved March 15, 1883,' approved March 1, 1893 (St. 1893, p. 59), adopted an ordinance, which was duly approved by the mayor, providing for a special election to be held in the city of Santa Cruz on the 13th day of March, 1894, at which there should be submitted to its qualified electors the question of refunding the outstanding bonded indebtedness of the defendant city. The indebtedness which it was thus proposed to refund was described in the ordinance as consisting not only of certain bonds of the city of Santa Cruz, amounting to the sum of $271,000, but also "eighty-nine (89) first-mortgage bonds (with interest thereon from November 1, 1893) of the corporation, the City Water Company of Santa Cruz, heretofore issued by said corporation, the City Water Company of Santa Cruz, which bonds bear date May 1, 1890, and are of the denomination of one thousand (1,000) dollars each, and bear interest at the rate of six (6) per cent. per annum, payable semi-annually, and are secured by a mortgage or deed of trust upon the property known as the 'City water works of Santa Cruz,' executed by the City Water Company of Santa Cruz, as party of the first part therein, to the Holland Trust Company of New York, as trustee, party of the second part therein; and which said bonds outstanding were, at the time of the conveyance by the City Water Company of Santa Cruz to the city of Santa Cruz of the property known as the 'City water works,' and now are, a valid lien and charge upon said property known as the 'City water works,' and became thereby

a part of the bonded indebtedness of the city of Santa Cruz." More than two-thirds of the qualified electors of the defendant voted at the special election thus called in favor of the proposition to refund the then outstanding bonded indebtedness of the defendant as described in the ordinance. Thereafter, on March 26, 1894, the common council of the defendant passed, and its mayor approved, an ordinance for the purpose of carrying into effect the will of the electors of the defendant, as expressed at such special election. This ordinance provided for the issuance of 360 interest-bearing bonds of the defendant of the denomination of $1,000 each, and also directed that such bonds should be signed by the mayor and city clerk, and that each should contain the following recitals:

"'This bond is one of a series of bonds of like date, tenor, and effect issued by the said city of Santa Cruz for the purpose of refunding the bonded indebtedness of said city, and issuing bonds therefor, and providing for the payment of the same, under and in pursuance of and in conformity with the provisions of an act of the legislature of the State of California, 'An act to amend an act entitled "An act authorizing the common council, board of trustees or other governing body of any incorporated city or town, other than cities of the first class, to refund its indebtedness, issue bonds therefor, and provide for the payment of the same," approved March 15, 1883,' approved March 1, 1893, and in pursuance of and in conformity with the constitution of the State of California and the ordinance of the city of Santa Cruz, and in pursuance of and in conformity with a vote of more than two-thirds of all the qualified electors of said city of Santa Cruz voting at a special election duly and legally called and held and conducted in said city, as provided under said act, on Tuesday, the 13th day of March, 1894, notice thereof having been duly and legally given and published in the manner as required by law, and after the result of said election had been duly canvassed, found, and declared in the manner required by law; and it is hereby certified and declared that all acts, conditions, and things required by law to be done precedent to and in the issue of said bonds have been properly done, happened, and performed in legal and due form, and as required by law.'"

"The ordinance further directed that such bonds should, after public notice inviting bids therefor, be sold to the

highest bidder for not less than their face value in United States gold coin, to be paid on delivery of said bonds at the city treasurer's office in the city of Santa Cruz. The bonds were offered for sale, but there were no bidders for the same, and on April 16, 1894, the date to which the common council of the defendant had regularly adjourned, there were present William T. Jeter, assuming to act as mayor, and J. Howard Bailey, F. J. Hoffmann, E. G. Green, and F. W. Lucas, assuming to act as the common council of the defendant. At this meeting a proposition theretofore made by Coffin & Stanton to take all of said bonds was accepted upon condition that satisfactory security for its faithful performance by Coffin & Stanton should be furnished. This proposition was dated February 27, 1894, and was, in substance, one by which Coffin & Stanton proposed to purchase the refunding bonds at par value, less 3 per cent., without the payment of any money at the time of their delivery, or giving any other consideration therefor than their promise to take up the outstanding bonds which were to be refunded, and to forward the same, 'from time to time, to the city for cancellation.' On April 23, 1894, the said William T. Jeter, assuming to act as mayor, and the said Bailey, Hoffmann, Green, and Lucas, assuming to act as the common council of the defendant, publicly met pursuant to adjournment, and without protest from any one, accepted and approved a bond presented by Coffin & Stanton for the faithful performance by them of the agreement contained in the foregoing proposition, and thereupon directed the city clerk of the city of Santa Cruz to deliver to that firm the entire issue of the refunding bonds referred to. The bonds were, in accordance with this direction, delivered to Walter Stanton, of the firm of Coffin & Stanton, on April 24, 1894, and thereafter Coffin & Stanton sold the same to various parties, from some of whom the plaintiff derived title to the bonds and coupons sued on. The plaintiff is only the nominal owner of said bonds, the same having been assigned to him for the purpose of collection only. Coffin & Stanton never complied in whole or in part with the agreement under which the bonds were delivered to them, and the city of Santa Cruz never received any benefit whatever from their sale, the entire proceeds thereof having been appropriated to their own use by Coffin & Stanton, and that firm is insolvent. The bonds are under the seal of the defendant, contain the recitals above set out,

and are signed: 'Wm. T. Jeter, mayor of the city of Santa Cruz. Attest: O. J. Lincoln, city clerk.'"

The City of Santa Cruz contended and still contends:

(1.) That the court below had no jurisdiction.

(2.) That the act of the legislature under which the bonds were issued was unconstitutional, in this:

a. It was special legislation.

b. It impaired in its working the obligation of contracts.

(3.) That there was a clear overissue of bonds, in this: The admitted assessed value of the city of Santa Cruz was $3,907,400, on which 15 per cent. was the limit allowed by law; yet the two bond issues unpaid showed a total indebtedness of $680,000.

(4.) That the refunding bonds were not legally issued and were not legally sold or delivered, but, on the contrary, were stolen.

(5.) That they were not signed by the regularly qualified mayor of Santa Cruz.

(6.) That the bonds were void because issued for the purpose of refunding the private indebtedness of the Santa Cruz City Water Company (a private corporation), when the statute only permitted a refunding of the city's "indebtedness evidenced by bonds and warrants thereof" (act March 1, 1893, § 1).

(7.) That all the holders of the refunding bonds had notice of these defects and of the invalidity of the election held to refund the same.

(8.) That Wallace & Co., holders of 150 bonds, had notice of all the defects through their agents and attorneys, whose

opinions were had before said bonds were purchased by them.

(9.) That the so-called refunding act of March 1 1893, even if it be held constitutional, did not give gene authority to issue bonds, but only implied authority, if any, to issue special bonds and for the particuiar purpose specified in the notice of election, a public record, of which all purchasers had constructive notice, and which on its face disclosed the invalidity of the bonds.

(10.) That the act of 1893 must be read in connection with the charter of Santa Cruz (Stats. 1875–'76, § 40, p. 203), which prescribes *how* the mayor and council could act, and provides that ordinances shall be kept "separately in large, well-bound, uniform, and suitable books."

In answer to the contentions of the defendant it was and is claimed in behalf of the plaintiff: First. That the persons assuming to act as mayor and common council of the defendant on April 16, 1894, and April 23, 1894, were *de facto* officers of the defendant. Second. That the assignors of plaintiff were *bona fide* purchasers of said bonds without notice, and that the defendant is therefore estopped from disputing the truth of the recitals contained in the bonds.

In the circuit court Justice De Haven held with the city that (89 Fed. Rep., 629)—

"The issuance of bonds for the purpose of refunding the indebtedness of the City Water Company of Santa Cruz, a private corporation, was not authorized by the act under which the bonds in controversy purport to have been issued; and as the bonds issued by the defendant for that purpose were not segregated from others of the same issue the court is not able to determine which particular bonds were to be devoted to the purpose of refunding the indebtedness of the private corporation, and the plaintiff is not entitled to recover in this action (Ætna Life Ins. Co. *vs.* Lyon Co., 44 Fed., 329, and Hedges *vs.* Dixon Co., 150 U. S., 182; 14 Sup.

Ct., 71), unless his contention that he is a *bona fide* purchaser without notice of this infirmity in the bonds, and as such is protected by the recitals contained therein, can be sustained."

However, the court held that the recitals did protect the purchasers, and, further, that the refunding act was constitutional and gave judgment for the bondholders. On appeal to the circuit court of appeals this judgment was reversed on the ground that in the act of 1893 there was no express grant of power on the part of the municipal authorities to issue any bonds. There was an implied power, but the implication was not to issue bonds for any and all purposes, but refunding bonds, with which to take up the outstanding bonds and warrants of the city, provided a majority of the qualified electors of the city should so vote upon the submission of the question to them in the mode described by the act; and for other reasons referred to in the decision of the United States circuit court of appeals.

The evidence adduced on the hearing before the circuit court established the fact that Santa Cruz was a little seaside resort of 6,000 people, and had an assessed valuation of $3,907,404; that it had at the time of the creation of the refunding debt, a debt somewhat as follows:

Improvement bonds, $60,000, less $21,000 redeemed	$39,000
Water bonds, 5 per cent., $300,000, $75,000 redeemed	225,000
Mortgage bonds alleged to be illegal, as they are the bonds of a private corporation	89,000
Say	$353,000

The ordinances 314 and 315 put it at $353,000.

In the Coffin & Stanton circulars in evidence the estimate of original debt is	$360,000
Refunding debt is	320,000
Total	$680,000

In addition to this there are a number of trustee bonds held by the Holland Trust Company of New York amounting to $270,000. The circulars of Coffin & Stanton, which are addressed to all the purchasers of the refunding bonds, refer in terms of eulogy to the charming position of Santa Cruz as a seaside resort.

Beautiful Santa Cruz.

Nature has lavished many of her choicest gifts on this beautiful spot. The experienced eye of the old Franciscan Fathers selected it as the site of one of their missions. Over one hundred years ago they erected an adobe church on the spur of one of the hills that overlook the San Lorenzo river. Its crumbling foundation walls were but lately removed to give place to a gothic edifice erected by an energetic and unselfish priest. About the adobe church the town first grew, until finally, throwing off its swaddling clothes, it vied with the San Lorenzo in its march to the sea. The effect of its picturesque situation is impressive. Before it lies the beautiful Bay of Monterey, and, far across to the south, an old and sleepy Spanish town of the same name. The peaceful waters of the bay, sweeping in a curve toward the mouth of the San Lorenzo, form a hard, sandy beach, unequaled for bathing. Nestling in valleys and crowning hillsides the little city forms a pleasing and undulating landscape, while far in the background appear a range of hills clad with primeval forests. Farther yet, touching the clouds, rises the bold knob of Loma Prieta like a sentinel tower of olden time. Toward the west, in all its grandeur and with its

ever-changing colors, lies the great Pacific ocean. Its climate never knows the intense heat of an eastern summer or the icy chillness of an Arctic winter. A drive on its cliff road is a sight worthy to be remembered. Mountain, hill, valley, bay, and ocean exhibit in turn their striking charms, which touch the heart and kindle in its recesses memories that never die. Yet this is the lovely spot which is now face to face with ruin.

The following propositions are submitted to the court:

I. The act of March 1, 1893, which is known as the refunding act, is unconstitutional.

II. The act of March 1, 1893, did not give general authority to issue bonds, but only implied authority (if any) to issue the special bonds, and for the particular purpose specified in the notice of election—a public record, of which all purchasers had constructive notice, and which on its face disclosed the invalidity of the bonds.

III. All purchasers of the bonds had notice of the overissue.

IV. The 150 bonds held by Wallace & Co. were acquired after knowledge of their illegal character.

V. The holder of 101 additional bonds had also notice of the defective issue.

I.

THE REFUNDING STATUTE UNDER WHICH THE BONDS WERE ISSUED IS UNCONSTITUTIONAL.

The statute is local and special. It authorizes the issuance of refunding bonds by all cities of the State of California except cities of the first class. It violates that section of the constitution which requires that the legislature shall not pass local or special laws in certain enumerated cases, and in all other cases where a general law can be made applicable (Const. Cal., art. 4, sec. 25, sub. 10, 11, 19, 24, 33). It further violates that section of the constitution which provides: "All laws of a general nature shall have "a uniform operation" (sec. 2, art. 1, Const. Cal.).

The supreme court of the State has repeatedly held acts of this kind unconstitutional. It was the design of the framers of the constitution to prevent, on the part of the legislature, a practice, theretofore permissible, of singling out a particular town or city and passing legislation directly affecting it and no other. It was believed that the exercise of this power by the legislature led to abuses, and that a constitutional provision relieving cities from this particular form of legislative control would better subserve the purposes of good government. Therefore, in the case of those municipal corporations known as counties, the constitution permitted a classification by population only for the purpose of fixing the compensation of officers, and insisted that the system of county governments should be uniform throughout the State (art. II, sec. 4), and that the duties of the officers recognized by this system should likewise be prescribed by general and uniform law (art. II, sec. 5).

When it came to treat of the other class of municipal corporations, cities, or cities and counties, and towns, it pro-

vided as follows: "Corporations for municipal purposes "shall not be created by special law; but the legislature, "by general laws, shall provide for the incorporation, organ- "ization, and classification, in proportion to population, of "cities and towns; which laws may be altered, amended, or "repealed. Cities and towns heretofore organized or incor- "porated may become organized under such general laws "whenever a majority of the electors voting at a general "election shall so determine, and shall organize in con- "formity therewith; and cities or towns heretofore or here- "after organized, and all charters thereof framed or adopted "by authority of this constitution, shall be subject to and "controlled by general laws." Still further to emphasize its policy, it set forth, in article 4, sections 25, 32, subjects upon which local legislation or special laws were inhibited, and in subdivision 33, as an "*omnium gatherum*," forbade the legislature from passing such laws "in all other cases where "a general law can be made applicable." These provisions clearly indicate, however, that the constitution does not mean to deprive the legislature of the power to pass laws affecting municipal corporations, but only to insist that such laws as may be passed shall be of general application, to avoid the evil spoken of.

The tendency of judicial opinion is to hold all legislation *special* which applies to a selected or designated class, even though it embraces the whole of the class, unless there appears some reason why its operation should be restricted, and some natural, intrinsic, and constitutional distinction given, and legislation which seeks to arbitrarily grant privileges or immunities, or to increase burdens or impose disabilities upon a particular class, which might for the same reason be made applicable to all others.

Where a statute authorized supervisors in counties of certain classes only to appoint deputies for county clerks, the court held the statute void and said: "'If there is any one feature of the constitution more marked, any characteristic more pervasive than all others, it is this oft-reiterated, this general and specific inhibition of local and special laws.' And yet, if they can be thus easily evaded, how ineffectual and farcical they are.

Legislatures and courts are not at liberty to disregard a policy so plainly manifested in the fundamental law. But while the sovereign will is thus plainly expressed in the fundamental law, the rule must not receive an interpretation too absolute. It will not be presumed that it was intended to deprive the legislature of all power to adapt its laws to the varying conditions of its inhabitants. From necessity it has been held that the legislature may classify in order that it may adapt its legislation to the needs of the people. If this cannot be done laws will not always bear equally upon the people. This classification, however, must be founded upon differences, which are either defined by the constitution or natural, and which will suggest a reason which might rationally be held to justify the diversity in the legislation. It must not be arbitrary for the mere purpose of classification that legislation, really local or special, may seem to be general, but for the purpose of meeting different conditions naturally requiring different legislation."

Darcy *vs.* Mayor, etc., 104 Cal., 642–645.

A necessity for such classification must exist, "a neces-
"sity springing from manifest peculiarities clearly distin-
"guishing those of one class from each of the other classes,
"and imperatively demanding legislation for each class
"separately that would be useless and detrimental to the
"others."

Id.

Where a statute made a discrimination between cities of the fifth and sixth classes and all other cities in the right of eminent domain, the court said: "The conclusion is, that "although a law is general and constitutional when it "applies equally to all persons embraced in a class founded "upon some natural or intrinsic or constitutional distinc- "tion, it is not general or constitutional if it confers particular "privileges, or imposes peculiar disabilities or burdensome "conditions, in the exercise of a common right upon a class "of persons arbitrarily selected from the general body of "those who stand in precisely the same relation to the sub- "ject of the law."

City of Pasadena *vs.* Stimson, 91 Cal., 238–251.

Where an act discriminated between teachers in large districts and those in small ones, the court, holding it invalid, said: "A special law is one referring to a selected class as "well as to a particular object. This act refers to a se- "lected class, viz., teachers in cities of 100,000 inhabitants."

Earle *vs.* Board of Education, 55 Cal., 489–494.

Where an act provided one rule for school districts having boards of education and a different rule where no such boards existed, the court held it to be local and special, and said: "Of course, as has been frequently decided, the pro- "hibition of special and local laws cannot be evaded by "arbitrary classification. In fact, a special law—special as "opposed to general laws on the one hand and private acts "on the other—classifies the subjects of the law for the pur- "pose of the special provisions. This classification is the "very thing prohibited by the constitution."

Bruch *vs.* Colombet, 104 Cal., 347–351.

Where a statute provided that policemen of certain cities having 10,000 but not more than 25,000 inhabitants should receive salaries different from those of other cities, the court

in holding the statute unconstitutional said: "The law in "question here, if the class specified would include San Jose "alone, is a law limiting the discretion of the council of "San Jose in regard to the compensation of policemen. "There is nothing in the fact that the population is between "10,000 and 25,000 which suggests a possible reason for ex- "cepting such municipality from the general rule. No "rational ground for the distinction appears. The classifica- "tion is, therefore, arbitrary and unauthorized."

Darcy *vs.* Mayor San Jose, 104 Cal., 642–648.

Where the insolvent act of 1880 permitted appeals to the supreme court from an order adjudging a party guilty of contempt in conflict with section 1222, C. C. P. (the general law), where no such appeals are permitted, the court held the act special legislation.

Ex parte Clancy, 90 Cal., 553.

An act concerning license taxes of cities or towns under ordinances of the board of supervisors of certain counties was held special legislation, as it applied to a single class of counties.

San Luis Obispo *vs.* Graves, 84 Cal., 71.

Where an act provided for the assessment of railroad property only, and the form of complaint in actions for collections thereof, the court held it to be special and discriminating legislation, and said: "A clause or provision "special in its character applying to particular individuals, "particular places or particular cases, is none the less special "because inserted in the most general of public acts. While "it is true, with some exceptions, that a law which applies "to all of a class in a State is held to be a general law, it is "equally true that one which applies only to a part of a "class is special and void as being within the constitutional

"inhibition. Legislation which relates not to any genus, "but only to species is special legislation."

People *vs.* C. P. R. R. Co., 83 Cal., 394, *syllabus.*

An act reducing salaries and purporting to affect only three of the forty-eight classes of counties of the thirty-fifth class into which the counties of the State had been classified was held to be eccentric, exceptional, and caused abuse of discrimination between officers upon which it operates, and therefore unconstitutional.

Miller *vs.* Kister, 68 Cal., 142.

An ordinance of San Francisco granting a privilege to a street railroad to use the tracks of another for more than five blocks was held in violation of the act of March, 1870, p. 481, providing for the use of five blocks only, and therefore special legislation.

Omnibus R. R. Co. *vs.* Baldwin, 57 Cal., 160.

An act providing a charter for cities of certain number of inhabitants that could not apply anywhere but in San Francisco was held unconstitutional upon many grounds, but also as special legislation.

Desmond *vs.* Dunn, 55 Cal., 242.

An act making it a misdemeanor to bake bread for sale between certain hours on Saturday and Sunday was held to be a special law and unconstitutional, because it discriminated against a certain class of working people.

Ex parte Westerfield, 55 Cal., 550.

A statute which made it a misdemeanor to conduct a barber shop on Sunday was held to be special legislation because based upon an arbitrary classification, and after citing with approval Pasadena *vs.* Stimson, 91 Cal., 238, and Darcy *vs.* Mayor of San Jose, 104 Cal., 642, the court said:

"In the case of our cities, the constitution itself decrees "classification by population, and the differing exigencies of "municipal government require that laws operating upon "any class should be held general. Otherwise the constitu- "tional scheme itself is overthrown. But in a law such as "this no reason has been or can be shown why the followers "of one useful and unobjectionable employment should be "debarred from the right to labor upon certain days and "others in like classes of employment be not so debarred."

Ex parte Jentzsch, 112 Cal., 468–474.

Where counties of the eighth class of the county government act were segregated from all others of the same class, and authority conferred upon the district attorney therein different from that officer in other counties, the court held the act to that extent local and special. The act of the legislature applied to one county and did not cease to be local because it purported to be applicable to a class of counties which the legislature was not authorized to create for the purpose of such legislation, and of which that county constituted the only member.

Welsh *vs.* Bramlet, 98 Cal., 219.

An act authorizing the district attorney of counties of the eighth class to appoint assistants to be paid by the county was held to be local and special legislation and in conflict with section 5 of article II, providing for general and uniform laws for the election or appointment, duties, and terms of officials.

Walser *vs.* Austin, 104 Cal., 128.

An act giving discretion to the judge of a court in counties of a specified class and making the allowance depend on the absolute will of the judge is a violation of section 25 of article IV of the constitution, forbidding special legislation regulating county business, and the same act providing that in

one class only a witness in a criminal case shall be allowed the same *per diem* and mileage as jurors, subject to the discretion of the judge, is unconstitutional and void as special legislation, and has not a uniform operation, as required by section 2 of article I, which provides that all laws of a general nature shall have a uniform operation.

Turner *vs.* Siskiyou Co., 109 Cal., 332.

An act adding a new article to the Political Code and providing for boards of election commissioners in cities, and cities and counties having 150,000 or more inhabitants, was held to be an improper attempt to create a class of municipal corporations for a special purpose without reference to the existing classification by general law, and also to be local and special legislation in conflict with section 25 of article IV of the constitution.

Denman *vs.* Broderick, 111 Cal., 96–103.

In that case it was said with approval: "In Desmond *vs.* "Dunn the court held that 'sections 6 and 7 of article VI "'of the constitution evidently contemplated the enactment "'of general laws providing for all corporations for municipal "'purposes and not for some only; and such laws must be "'as general as the subject to which they relate."

The primary election law of March 27, 1895, being expressly confined in its operation and effect to counties of the first and second class, was held to be local, special, and unconstitutional for the reason that such a law was upon a subject-matter to which a general law having a uniform operation throughout the State could be made applicable.

Marsh *vs.* Supervisors of Los Angeles, 111 Cal., 368.

An act permitting the voting of straight tickets by stamping the ticket opposite the names of certain parties at the head of the ticket was held unconstitutional, as not providing for a uniform operation of the law.

Eaton *vs.* Brown, 96 Cal., 371.

A section of an act providing that in counties of the thirty-third class certain extra fees shall be collected from the estates of deceased persons in addition to the prescribed fees was held to be unconstitutional and void because in violation of section 4 of article XI of the State constitution, which commands the legislature to establish a uniform system of county governments, and also of section 11 of article I, which requires that all laws of a general nature shall have a uniform operation, and also of section 33 of article IV forbidding local or special laws in all other cases where a general law can be made applicable. It was there said that although a law is general and constitutional when it applies equally to all persons embraced in a class founded upon some natural, or intrinsic, or constitutional distinction, it is not general or constitutional if it confers particular privileges or imposes peculiar disabilities or burdensome conditions in the exercise of a common right upon a class of persons arbitrarily selected from the general body of those who stood in the same relation to the subject of the law.

Bloss *vs.* Lewis, 109 Cal., 493.

In the last and leading case just decided, where an act provided for the regulation of fees in cities and cities and counties with a population of over 100,000 inhabitants and prescribed the duties of the officers in reference thereto, it was held that such an act was unconstitutional and invalid, as it was based upon an arbitrary distinction, there being no reason why attempted protection shall be accorded to a city of 100,000 inhabitants and not to one of less population, and also as special legislation in a case where a general law can be made applicable. The object of classifying municipal corporations according to population and forbidding their creation by special laws was to avoid the necessity of special legislation. The legislature cannot pass laws touching the organization and in-

corporation of municipalities except by conforming to the requirements of the classification; but upon other matters it may pass general and uniform laws applicable either to municipal corporations of a given class or to all of a separate class created by and designated in the act itself, provided some plain reason appears for the limitation to a class where the law does not apply to all municipalities within the same category. A law is not necessarily a general law merely because it operates upon all municipalities within a specified class, and it is special if it applies merely to all within a class without reason appearing why it is not made to apply generally to all municipal corporations. It was there said: "There is, therefore, nothing in the law "itself, no inherent reason shown why it should be made "applicable to one class and not to all. * * * There is, "then, no natural, or intrinsic, or constitutional distinction "warranting the act in question while there are express "constitutional inhibitions against it."

Rauer *vs.* Williams, 118 Cal., 401.

The court also said: "But while it is thus seen that all "municipalities within the State are subject to the operation and control of general laws under the classification "act of 1883, provided those laws affect their incorporation "and organization, and while it is further seen that a law "touching upon matters of incorporation and organization "will not be held to be a special law because it operates only "upon one or several of the classes, it does not follow that "there may not be legislation not affecting incorporation or "organization which will be general without reference to the "classification act of 1883. To hold otherwise would de"prive of all efficacy and utility the last clause of section 6, "article XI, of the constitution, which declares that 'cities "'and towns heretofore or hereafter organized shall be "'subject to and controlled by general laws.'" To illustrate: The legislature might desire to allow all seaboard cities to

provide for their sewers in the ocean. Such outlets, unless permitted or sanctioned by the legislature, might be held purprestures. It would be meaningless for the legislature to declare that all cities of the first class, or of the second class, or of the third class, might provide such outlets, for of the municipalities in the enumerated classes many might be inland cities. A law providing that all seaboard towns and cities might provide such outlets for their sewers would neither conform to the classification of the act of 1883, nor would it apply to all municipalities within the State; but it would still apply to all within the class thus created by the act itself—that is to say, to all similarly situated—and would be a general law contemplated and permitted by the portion of section 6 of article II of the constitution just quoted. Or, again, instancing a narrower case: A law of the legislature affecting all cities within the State which are ports or subports of entry, and providing a State quarantine system therefor, would not conform to the classification act, and such a law would not apply, because it would be needless to make it apply to all seaboard cities, but it would apply to all cities within the designated class, and such an act likewise would unhesitatingly be upheld as within the scope of section 6 of article II. It may be concluded, therefore, that while the legislature cannot pass laws touching the organization and incorporation of municipalities except by conforming to the requirements of the classification act, upon matters not affecting the incorporation or organization (as in the instances above cited) it may pass laws which will be general if they operate uniformly and generally upon all cities of the class created by and designated in the act itself.

This, the latest decision on the subject, gives the true test of a special law, which is that when it is so made to apply to a class and not to all within the same general category and law, reason must appear for the limitation. It by no means follows that a law is a general law because it operates upon all within a class. It is still special if it applies to all

within a class without reason appearing why it is not made to apply generally to all. The rule is that all laws of a general nature shall have a uniform operation. Where is, then, the reason for a refunding bill which excludes cities of the first class? Is not refunding as essential to them as it is to smaller communities? Why make a distinction? Where is the natural intrinsic or constitutional difference between one city and another so far as the refunding of debts is concerned? It is urged in reply to the authorities cited that the legislature is the sole judge of the reason why the refunding act does not apply to counties of the first class. The constitutional convention inserted the many inhibitions against special laws to prevent such legislation as the very act now under discussion. Not only, therefore, does our supreme court differ from counsel in this respect, but the convention, in adopting the provision of the constitution against special legislation, considered this question and decided adversely to plaintiff's contention.

Constitutional Convention.

The reports of the constitutional convention show that at the time this section in reference to special legislation was under consideration Delegate McFarland, now one of the justices of the supreme court of California, moved to strike out the thirty-third subdivision of section 25, article 4, and said in support of his motion: "Whenever a law is passed "by the legislature somebody will take it to the supreme "court to see whether it is special or general. It is entirely "unnecessary and mischievous. We don't want to provide "for any more constitutional law questions than are abso-"lutely necessary. The courts will have enough to do, any-"way."

Delegate VAN DYKE: I agree with the gentleman that this is a vicious amendment, and I can see no good purpose

that it can subserve; it will always raise the question in court whether a law could not have been made general.

Mr. LARKIN: It is rather remarkable that these two distinguished lawyers should raise an objection to this section. It would tend to encourage their business. That section is the most important section of the whole provision; it is a true principle of government, and whenever a general law can be made applicable a special law should not be passed.

And the convention concurred in the view of Mr. Larkin and refused to strike out the thirty-third subdivision.

Subsequently the same motion was renewed, and after debate on the same line the convention again refused to strike out the subdivision. This shows clearly that it was the sense of the convention, not only that it should remain in the constitution, but that it should mean what it says, and that the courts, in the cases presented to them, should determine the question whether a general law could be made applicable in all the counties as well as in one or more.

Los Angeles *vs.* Teed, 112 Cal., 319, cited by appellant, is not in point for the reason that it decided that the statute or ordinance providing that municipal bonds for the funding of city indebtedness made payable outside of the State at a bank in New York city, or at any other place than the city treasury, contravenes sections 15 and 16 of article II of the constitution and is invalid. It is true the reading of the opinion on other points is quite instructive, but its conclusions are simply *obiter dicta*. Its reasoning in reference to the distinction between large and small cities in reference to refunding is directly opposed to the decisions in the State of New Jersey, which will be cited, and to the case of Rauer *vs.* Williams, *supra*. There is nothing in People *vs.* Henshaw, 76 Cal., 436, and Cody *vs.* Murphy, 89 Cal., 522, to affect the position of defendant. These cases are clearly distinguished in the concurring opinion of Beatty, Ch. J., in Dougherty *vs.* Austin, 94 Cal., 621, as those decisions are sustained by section 6 of article 11 of the constitution, which

permits a classification of cities in proportion to population for the purpose of regulating fees of officers. These are the two principal cases upon which defendant relies. It will serve no useful purpose to point out where the other decisions are inapplicable. In Johnson *vs.* Milwaukee, 60 N. W. Rep., 270, which is said by plaintiff's counsel to be on all fours with the case at bar, the act of the legislature permitted cities with a population of 3,000 inhabitants to issue bonds for parks, etc. It was there said that a law relating to particular persons and things of a class is special; to particular persons or things as a class is general. The certain rules by which the propriety of the classification may be tested have been stated. The main difficulty is in the application. One rule is that classification must be based upon substantial distinctions which make one class really different from another; for example, small cities do not require parks and roads the same as large ones, as the people are near the country and free air as the citizens of a city are to any park. The difference suffices for a classification. This does not touch the proposition why refunding is more essential to a small city than to a large one. There can be no good reason given for the difference. But many reasons can be urged why refunding should apply to all cities without distinction whatsoever. Knickerbocker *vs.* People, 102 Illinois, 218, decides that a law applicable to all counties of a class is neither a local nor a special law. In this case the legislature had established probate courts in counties with a population of 5,000 people only.

A case which fits the one at bar and answers completely the attempted distinction between refunding debts of large and small cities is Anderson *vs.* City of Trenton, 42 N. J. Reports, p. 486, where it was held that a statute purporting to confer upon all cities having a population of not less than 25,000 inhabitants the power of issuing bonds to fund their floating debt is a special law and in violation of the constitutional amendment which forbids the passing of special

laws to regulate the internal affairs of towns. The opinion of the court was delivered by Dixon, J.: "An act concern-
"ing cities, approved March 12th, 1880 (Pamph. L., p. 258),
"declares that it shall be lawful for any city within this State
"having a population of not less than 25,000 inhabitants, and
"having a floating or unbonded debt which the available
"funds of such city are insufficient to pay, by and through its
"common council or other body having control of its finances
"to borrow money to the amount of such floating or un-
"bonded indebtedness and to issue bonds therefor.

"The common council of the city of Trenton, deeming it to
"be among the municipalities thus designated, passed an ordi-
"nance for the issuance of bonds to fund its floating debt by
"virtue of these provisions, whereupon the prosecutor, a citi-
"zen and tax-payer in Trenton, sued out a writ of certiorari
"to test the legality of the corporate proceedings.

"The contention of the prosecutor (*inter alia*) is that this
"statute is special and local, and contravenes the constitu-
"tional amendment found in paragraph 11, section 7, article
"IV, which forbids the passage of private, special, or local
"laws to regulate the internal affairs of towns.

"Under this clause of the constitution it has already been
"decided in this State that a law to be neither special nor
"local need not apply to all towns—that it will be general if
"it apply to a class of towns. Thus cities have been held to
"be included among 'towns,' as here intended (Van Riper *vs.*
"Parsons, 11 Vroom, 1; Pell *vs.* Newark, 11 Vroom, 550), and
"so are townships said to be (11 Vroom, 555), and, doubtless, a
"law embracing all cities or all townships would be constitu-
"tional; for these bodies, because of their marked peculiari-
"ties, are, by common consent, regarded as distinct forms of
"municipal government, and so constituting classes by them-
"selves. But it has further been considered that these classes
"may also be subdivided by the legislature so that a law will
"be general which yet only touches a subdivision. As, how-
"ever this power of subdividing by legislation would, if unre-

"stricted, include the power to legislate for every individual "singly, since no two individuals are exactly alike, the con- "stitutional prohibition required that some limit, excluding "special and local legislation, should be placed upon its ex- "ercise. Hitherto this limit has been declared to exist in "the principle that the class to be affected must consist of "individuals distinguished by some important characteristic "to which the purpose of the law relates, and must embrace "all those so characterized. Thus, a statute giving to all "cities bordering upon tide water the power to construct "docks or establish quarantine regulations, or providing that "in all towns having volunteer fire departments the mem- "bers of the department should choose a commission to gov- "ern them, would, I presume, be valid. These groups would, "according to the principle laid down, be naturally classified "for legislation touching their peculiar qualities, and such "legislation, though affecting them alone, would be general. "But any attempt to legislate for a group of cities not classi- "fied in harmony with this principle is, as I understand, "declared to be evasive and in violation of the fundamental "law.

"The question to be determined concerning the law now "under review, therefore, is whether, since it does not relate "to all cities, it affects a class of cities constituted upon "this principle—whether the basis of classification is some "peculiar feature to which the provisions of the law are "naturally related.

"The basis of classification is a minimum of popula- "tion. The powers to be conferred by the statute concern "the issue of bonds for the purpose of funding floating "debts. Now, I am unable to see any natural connection "between the number of people in a city and its right "to refund its floating debt. It is true that there may be "some propriety in denying this authority to very small "municipalities and granting it to larger ones, but the same "may be said of almost every power usually possessed by

"cities. And it is manifest that if the classification made by "a statute is to be justified or not by considering whether it "is proper to apply the peculiar provisions of the law "to the particular individual or individuals designed to "be affected, then laws will be upheld or overthrown, not "as the courts shall decide them to be general or special, "but as they shall deem them wise or unwise. No rule "heretofore laid down in this State sanctions such a test "of constitutionality, nor do I think that such a criterion "should be adopted.

"In Pennsylvania, under a constitutional provision simi- "lar to ours, a statute has been adjudged valid which "divided the cities of the State into three classes—the first, "of cities containing over three hundred thousand inhabit- "ants; the second, of those containing from one hundred "thousand to three hundred thousand, and the third, of "those containing from ten thousand to one hundred thou- "sand (Wheeler *vs.* Philadelphia, 77 Penn. St., 338; Kil- "gore *vs.* Magee, 85 *id.*, 401).

"But that statute is distinguishable from the one now "before us, inasmuch as that classification was made for the "purposes of municipal legislation, and could, therefore, be "regarded as a general classification, while in the present law "the grouping of cities is for a special purpose only—to confer "on some a power of funding debts not granted to others; and "hence, in this respect, the law is special. If it be sustained "the classes into which towns may be divided on this simple "basis of population will be as numerous and diversified as "the purposes of the legislature, and all the evils sought to "be averted by the abolition of the power to legislate for "individuals will return under the form of class legislation. "I see no view in which this law will appear to be general."

On the same proposition of special legislation, in Classen *vs.* Trenton, 48 N. J. L. R., 438, it was held that "an act to "establish a license and excise department in certain cities "containing more than 15,000 inhabitants, and in which "the granting of licenses is not already vested in a board of

"excise, as in the court of common pleas, is local and special, "and, therefore, unconstitutional." The court said: "This "legislation is, in my judgment, clearly special. There can "be no reason suggested why cities with more than 15,000 "inhabitants should have a system of granting licenses "differing from that of cities with a less population. In re- "spect to the subject-matter of the legislation all cities are a "class, and an attempt to segregate cities into distinct classes "for this purpose by a standard of population is not classifi- "cation, but an arbitrary selection of one or more localities "for legislation" (p. 439). "Inasmuch as the granting of "licenses is a matter which appertains to all cities, any legis- "lation which deals with the method of granting licenses "must apply to all cities or reduce all cities to a uniform "system (p. 440)" (Tiger *vs.* Morris, Common Pleas, 13 Vroom, 631).

In Richards *vs.* Hosmer, New Jersey Law Rep., vol. 42, p. 439, an act regulating the internal affairs of two cities was declared unconstitutional because it only applied to them and could not apply to any other. It was there said: "But "a single argument has been presented in its support, which "is, that this act is general in its terms and embraces 'all of "a group of objects having characteristics sufficiently marked "and distinguished to make them a class by themselves.' "And these qualities, it is contended, bring this case within "the requirements of the constitution as the same is ex- "pounded in the case of Van Riper *vs.* Parsons, 11 Vroom, "125. But I do not understand that the decision thus in- "voked will bear the construction thus put upon it. It does "not undertake, as I understand it, to lay down any abstract "rule on this subject, but the expressions quoted are employed "in reference to the facts then under adjudication. Plainly "a law may be general in its provisions, and may apply to "the whole of a group of objects having characteristics suffi- "ciently marked and important to make them a class by "themselves, and yet such law may be in contravention of "this constitutional prohibition. Thus, a law enacting that

"in every city in the State in which there are ten churches "there should be three commissioners of the water de- "partment with certain prescribed duties, would present "a specimen of such a law, for it would sufficiently "designate a class of cities and would embrace the whole "of such class, and yet it does not seem to me that it "could be sustained by the courts. If it could be so sanc- "tioned, then the constitutional restriction would be of no "avail, as there are few objects that cannot be arbitrarily "associated if all that is requisite for the purpose of legis- "lation is to designate them by some quality, no matter "what that may be, which will so distinguish them as to "mark them as a distinct class. But the true principle re- "quires something more than a mere designation by such "characteristics as will serve to classify, for the character- "istics which thus serve as the basis of classification must "be of such a nature as to mark the objects so designated as "peculiarly requiring exclusive legislation. There must be "substantial distinction having a reference to the subject- "matter of the proposed legislation between the objects or "places embraced in such legislation and the objects or "places excluded. The marks of distinction on which the "classification is founded must be such, in the nature of "things, as will, in some reasonable degree, at least, account "for or justify the restriction of the legislation. Principles "of this sort can be best elucidated by examples. I have "already given a sample of a merely arbitrary classification "founded on no casual relation between the subject-matter "of such legislation and the things so classified. A sample "of the other, or legitimate kind, would be signified in a law "that should give to all cities in the State situated on tide "water the privilege of using such waters in connection "with their sewers. In such an enactment but a part of "the cities of the State would be embraced, but the classifi- "cation would be lawful and proper, inasmuch as the places "embraced would be possessed of a characteristic distinct "from those possessed by the excluded places, such charac-

"teristics being of such a nature as to afford a reasonable "ground for such special legislation. In the two classes of "instances thus exemplified the basis of the classification of "the one would be by a reference to marks of distinction "having no connection with the substance of the supposed "statute; in the other the opposite of this would obtain—so "that in the former the classification would be formal and "arbitrary; in the latter, substantial and springing out of "the nature of the subject of this legislation. The present "law is seemingly of the former kind. The class to which "it is made applicable is designated and selected by the "mark of each of its members, being possessed of a certain "kind of board of officers, a circumstance having no con- "nection but a formal one with the subject-matter of this "law, and in no way indicating a reasonable ground for "making these particular places the object of such special "legislation. In all but mere form, as I have said, these "places might as well have been designated by name as by "a reference to these organic bodies possessed by them, and "the effect of this law would have been precisely the same. "It seems to me difficult to find any stable ground for sus- "taining such an act, and, therefore, these writs should be "issued so that the question can be brought before the "courts in a formal manner."

The reasoning of Rauer *vs.* Williams, *supra*, is somewhat similar. To the same effect see:

Clarke *vs.* Cape May, 50 N. J. L., 558.
Atchison *vs.* Bartholow, 4 Kan., 124.
Hightstown *vs.* Glenn, 47 N. J. L., 105.
People *vs.* Cowper, 83 Ill., 585.
State *vs.* Philbrock, 15 At. Rep., 579.
Topeka *vs.* Gillett, 32 Kansas, 431.
State *vs.* Anderson, 44 Ohio St., 247.
State *vs.* Pugh, 43 Ohio St., 98.
State *vs.* Herrmann, 75 Mo., 340.
Scowden's Appeal, 96 Pa. St., 422.
Appeal of Ayars, 122 Pa. St., 266.

A General Refunding Act Now Exists.

As a complete answer to the claim that certain municipalities need a funding bill distinct in operation from others, and that there cannot be a general refunding act, it will suffice to say that a general refunding law is to be found in the statute book. On April 27, 1880, a law was passed adding five sections to the political code under the head of Funding and Refunding of City Indebtedness. These are known as section 4445, power of trustees or municipal council to fund indebtedness; issuance and form of bonds, section 4446; sale and exchange of bonds, section 4447; tax for payment of bonds; "bond fund," section 4448, redemption of bonds; section 4449, proceedings on failure to levy tax, county government act, section 25, sub. 14, Stat. 1893, p. 358.

Serious Objection to Act of 1893.

No method is pointed out whereby the old bonds can be exchanged for new interest-bearing bonds, as in the act of 1883. In fact, the act does not permit it. This clause of the act of 1883 is not re-enacted. Section 2 of the act of 1893 provides that whenever the treasurer has sufficient money in his hands he shall give notice of such fact by publication, and that he is prepared to pay the bonds, and if the same are not presented for redemption within 30 days after the first publication of such notice the interest on the bonds ceases. This is a clear case of violation of the agreement with the bondholder, and impairs the obligation of contracts, contrary to the Constitution of the United States and the Constitution of California.

See leading case of Louisiana *vs.* Pilsbury, 105 U. S., 278.

Sec. 10, art. I, sub. 1, Const. U. S.

Art. IV., sec. 1, Const. U. S.

Sec. 186, Simonton on Bonds.
Sec. 16, art. I, Cal. Const.
Meyer *vs.* Brown, 65 Cal., 583.
Davis *vs.* Yuba, 75 Cal., 452.
Bates *vs.* Porter, 74 Cal., 224.

This point is fatal to the act of 1893.

Mr. Justice De Haven, however, held that the act was not special. He said in deciding this case (89 Fed. Rep., 624):

"The constitution of the State of California recognizes the fact that it is wise to classify cities and towns with reference to population, so that legislation relating to their organization may be adapted to the interests or necessities of the different classes. Section 6 of article 11 of that constitution provides:

"'Corporations for municipal purposes shall not be created by *special laws*, but the legislature, by *general laws*, *shall provide* for the *incorporation*, organization, and classification, in proportion *to population*, of cities and towns, which laws may be altered, amended or repealed.'

"The word 'organization,' as here used, has reference to the powers which may be given to municipal corporations, and it is clear that by this section the legislature is authorized to provide different constitutions or charters for different classes of municipal corporations; that is, the legislature may, in its discretion, give to one class powers which are withheld from another. Now, the statute under consideration here confers upon municipal corporations other than those of the first class the power to issue negotiable bonds for the purpose of refunding their outstanding indebtedness. The statute deals with a subject proper to be considered by the legislature in the organization of cities and towns in the first instance, or in subsequent legislation relating thereto. Viewed in this light, it is apparent that the statute is not a special or local statute, within the meaning of the constitution prohibiting that character of legislation; and this conclusion is fully sustained by the cases above cited."

Answer to Mr. Justice De Haven.

The reasoning of Mr. Justice De Haven is best met and answered by the decision of Rauer *vs.* Williams, 118 Cal., 401, wherein it is said:

"The act under consideration, therefore, is not to be condemned merely because it applies to cities and cities and counties of the first class; for, as has been said, it may apply to but one class and still be a general law. But when a law is so made to apply to a class and not to all within the same general category, plain reasons must appear for the limitation. It by no means follows that a law is general because it operates upon all within a class. It is still special if it applies to all within a class *without reason appearing why it is not made to apply generally to all.* City of Pasadena *vs.* Stimson, 91 Cal., 238; Darcy *vs.* City of San Jose, 104 Cal., 642; *Ex parte* Jentzsch, 112 Cal., 468.

"All laws of a general nature shall have a uniform operation (Const., art. I, sec. 2), and the legislature is required by general and uniform laws to provide for the strict accountability of county officers for all fees which may be collected by them (Const., art. XI, sec. 5). This provision is not inconsistent with the provisions of the constitution applying to cities alone, and is, therefore, applicable to cities and counties (Const., art. XI, sec. 7; Kahn *vs.* Sutro, 114 Cal., 316).

"The manifest purpose of the act in question is to provide a scheme for the collection of fees which the legislature believes would be better and safer than the one in operation. Clearly the law is not designed for the convenience of the public, but for the protection and security of the municipality. But, this being so, there is no inherent reason, and no reason at all, why this attempted protection shall be accorded to a city of over 100,000 inhabitants and not to one of less population. It will not be said that there is danger of peculation and misappropriation of funds in the one case and no danger in the other. There is, therefore, nothing in the law itself—no inherent reason shown—why it should be made applicable to one class and not to all. In addition, it violates the express constitutional mandate requiring by general laws a strict accountability of officers for all fees; and, finally, it is a special law, passed in a case where a general law is applica-

ble. There is, then, no natural or intrinsic or constitutional distinction warranting the act in question, while there are express constitutional inhibitions against it."

The reasons given here are alike applicable to the case at bar.

To the same effect see—

Anderson *vs.* Trenton, 42 N. J. L. R., 486.
Richards *vs.* Hammer, 42 N. J. L. R., 439.

II.

THE SO-CALLED REFUNDING ACT OF MARCH 1, 1893, DID NOT GIVE GENERAL AUTHORITY TO ISSUE BONDS, BUT ONLY IMPLIED AUTHORITY (IF ANY) TO ISSUE THE SPECIAL BONDS, AND FOR THE PARTICULAR PURPOSE, SPECIFIED IN THE NOTICE OF ELECTION, A PUBLIC RECORD, OF WHICH ALL PURCHASERS HAD CONSTRUCTIVE NOTICE, AND WHICH ON ITS FACE DISCLOSED THE INVALIDITY OF THE BONDS.

Mr. Justice Ross in the case at bar succinctly states the law to be (98 Fed. Rep., 387–391):

"The Federal courts have always protected with a firm hand the rights of *bona fide* creditors of municipal corporations, uniformly holding that the bonds issued by such corporations under *granted* power, negotiable in form, are valid in the hands of a *bona fide* holder, notwithstanding irregularities in their issue, or even in the non-performance of prior conditions, *where the determination of the facts of such performance are by the law left to the determination of the municipal officers*, and they incorporate in the bonds which are

put upon the market proper recitals of such performance. The obvious reason for this is that where the law under which such securities are authorized to be issued commits to the *municipal representatives the determination of the conditions precedent*, and those representatives recite on the face of the bonds such performance, common honesty demands that the municipality be estopped to deny the truth of the recitals as against the *bona fide* purchaser of the bonds; *but it is equally well settled* that where the power to issue such bonds did not exist, or where the law under which they are issued requires *certain facts* to be made a matter of record open to the inspection of every one, there *can be no implication* that it was intended to leave such *facts to be determined* by the officers charged with the duty of issuing the bonds, and conclude by their recitals contrary to the facts so recorded (Sutliff *vs.* Commissioners, 147 U. S., 230; 13 Sup. Ct., 318, 37 L. ed., 145; Dixon Co. *vs.* Field, 111 U. S., 83; 4 Sup. Ct., 315, 28 L. ed., 360). It is, as a matter of course, not denied that every purchaser of a municipal bond is charged with notice of the law under and by virtue of which it is issued. In the present case that law is found in the statute of March 1, 1893 (St. 1893, p. 59), the first and second sections of which are as follows: * * *

"It will be noticed that there is in this act *no express* grant of power on the part of the municipal authorities to issue any bonds. There is an implied power, but the *implication* is not to issue bonds for *any and all purposes*, but refunding bonds with which to take up the outstanding bonds and warrants of the city, provided a majority of the qualified electors of the city should so vote upon the submission of the question to them in the mode described by the act. Whether the then outstanding indebtedness of the city should be refunded or not was not left to the *determination* of the municipal authorities, but they were by the statute empowered to submit that question to a vote of the qualified electors of the city, specifying in the notice of election the indebtedness to be refunded, together with all details of the proposed issue. The power thus conferred on the mayor and council could only be exercised at a meeting of the municipal board. Such bodies can only act by order, ordinance, or resolution, as every one is bound to know (Wesson *vs.* Saline Co., 20 C. C. A., 227; 73 Fed., 919; 15 Am. & Eng. Ency. Law, pp. 1028–1030, and cases there cited). In the

present instance the action of the mayor and council was by ordinance, as appears from the findings of the court below. Such ordinance was a part of the public records of the city, which by its charter are required to be kept 'in large, well-bound, uniform, and suitable books' (Stats. 1875–'76, p. 203). The indebtedness of the city thus evidenced by its outstanding bonds and warrants and proposed to be refunded by the issuance of other bonds the act of March 1, 1893, authorized the mayor and common council of the city to specify, together with the details of the proposed issue, and submit the question refunding the specified indebtedness upon the designated terms to the qualified electors for determination. In the event the majority of the votes should be in favor of the proposition, then the municipal authorities were *impliedly empowered to issue refunding bonds therefor, but for no other purpose.* The public record which the act of March 1, 1893, *taken and read, as it must be, in connection with the charter of the city*, required to be made by order, ordinance, or resolution disclosed to all the world the specific indebtedness that it was proposed by the municipal authorities to refund and in respect to which the qualified electors of the city were called upon to vote. The officers impliedly charged with the issue of such refunding bonds were *not in any manner* authorized to make any certificate or representation to prospective purchasers in respect to the character of the indebtedness evidenced by outstanding bonds or warrants of the city, in lieu of which the refunding bonds are authorized to be issued. On the contrary, the statute itself was clear notice to every person that upon the records of the governing body of the city was required to be entered the specific indebtedness proposed to be refunded, together with the details of the proposed issue of refunding bonds, and that it was only for such specified indebtedness that any refunding bonds could be issued. To that record every purchaser was referred by the very act under which alone the bonds in suit were issued. The notice of election directed by this act to be prescribed by the mayor and common council of the city occupies substantially the same position that the resolution did in the case of Lehman *vs.* City of San Diego, which was lately before this court and is reported in 27 C. C. A., 668; 83 Fed., 669. The present case is, we think, clearly within the doctrine of that case, and of Sutliffe *vs.* Commis-

sioners, *supra*, and Dixon Co. *vs.* Field, *supra*, and kindred cases, and must be ruled by them."

This clear and lucid statement of the circuit court of appeals should suffice to settle the points involved. The difficulty encountered by the bondholder is that he has not recognized the importance of the following:

A. *The limited power given by the statute of 1893.*

B. *The charter of Santa Cruz.*

C. *The decisions of the supreme court of the State of California.*

All the cases cited in the brief are based upon statutes which, first, do not resemble those of California; and, second, in which there was a general power given to the municipality to issue bonds. Before referring at length to the cases cited, attention must be called to—

A.

The Limited Power Given by the Statute of 1893.

As we have seen, it is a serious question whether this refunding act of 1893 is not unconstitutional. As a matter of prudence, a purchaser of bonds issued under its provisions should narrowly examine its provisions to ascertain, first, if the object of their issuance was lawful; and, second, if the words of the statute gave full power. A bare examination would suffice to show that no general power was conferred, and that no duty was imposed on the municipal authorities to pass upon the question of refunding without reference to the submission of the fact to the electors in accordance with the rules of law and the charter of the city and the statutes of the State. The common council could not proceed irregularly and make recitals that existed only in their imagina-

tions. In other words, there must be authority of law for the issuance of valid bonds. It was said in Dixon County *vs.* Field, 111 U. S., 83–92: "All parties are equally bound to know the law; and a certificate reciting the actual facts, and that thereby the bonds were conformable to the law when judicially speaking, they are not, will not make them so, nor can it work an estoppel upon the county to claim the protection of the law." In other words, a violation of the statute means the same as an absence of statutory authority for the issuance of bonds. Now, an examination of the statute of 1893 shows that it applied, if at all, only to "an outstanding indebtedness evidenced by the bonds and warrants thereof." As was clearly said in this case by the circuit court of appeals: "The statute itself was clear notice to every person that upon the records of the governing body of the city was required to be entered the specific indebtedness to be refunded together with the details of the proposed issue of refunding bonds, and that it was only for such specified indebtedness that any refunding bonds could be issued. To that record every purchaser was referred by the very act under which alone the bonds in suit were issued." The refunding act made the notice of election jurisdictional. It was required to be given by the mayor and common council (Stats. 1893, p. 59). The mayor and common council could act only by ordinance (Wesson *vs.* Saline, 73 Fed., 919); the ordinances of the mayor and common council were public records, required to be kept "separately, in large, well-bound, uniform and suitable books" (Stats. 1875–'6, sec. 40, p. 203). As a fact, an ordinance was so adopted, recorded, and kept as a public record (Findings, 63 to 75), and said record showed that the bonds were issued for an unlawful purpose (Findings, 63 to 75, opinion of the court below, sub. 4), and that the election was invalid because the ordinance required the polls to be closed one hour and fifteen minutes before the time prescribed by law (Findings, 62–'3; Stats. 1875–'6, p. 191, sec. 5,

providing: "*The polls for all elections shall be opened at "nine o'clock a. m. and shall not be closed until sundown of the "same day*").

This brings the case at bar directly within the rule laid down in Lehman *vs.* San Diego, 83 Fed., 670; Dixon Co. *vs.* Field, 111 U. S., 93, and Sutliff *vs.* Board, 147 U. S., 230; and takes it out of the category of Chaffee *vs.* Potter, Hackett *vs.* Ottowa, and other cases cited on this point by defendant in error below.

There was no authority under the act of 1893 to include the payment of a private water company in the indebtedness of Santa Cruz. If a debt of this kind could be refunded in violation of a statute expressly forbidding it and in defiance of the rule of the constitution of California forbidding the payment of public money for private purposes, it will be readily seen that evil results will follow. Municipalities will be looted and plundered without power to protect themselves, and the game played at Santa Cruz will be attempted in other places and on a larger scale. It is a matter of grave concern to the American to observe the looseness with which the cities of the United States are governed and debts contracted in marked contrast to those of foreign nations. It would seem as if there was a tendency to assist the work of the despoiler instead of staying his hands. In the case at bar the evidence shows that, as Justice Gilbert truly remarks, "the city of Santa Cruz was by its agents defrauded of the proceeds of the refunding bonds, and never in fact received any portion thereof." One can see at a glance how easy it would have been, and was, for those who allege that they are innocent purchasers to obtain all the necessary information about the frauds committed. As it was, all of the bondholders had a knowledge of the ordinances.

They knew by the reports of their attorneys that the statute of 1893, by the very act of directing certain action to be taken by the mayor and common council, incorporated into the statute the charter of Santa Cruz, prescribing in de-

tail the mode and manner in which alone they could act, and consequently must be construed and read precisely and exactly as if it had said in so many words that the bonds could only be issued to refund an indebtedness of the city, *evidenced by bonds and outstanding warrants thereof specifically recited and described in an ordinance spread on the records and minutes and transcribed and kept open for public inspection in large, legible, and well-bound books, etc.*

In this case every feature of the legislation portrays the intention to interpose as a shield between the municipality and those dealing with its agents the public and definite record, *expressly required by law*, which contains on its face the imperishable and unmistakable evidence of the jurisdiction of the officials, their compliance with their only letter and warrant of authority or their disregard of its limitations and conditions.

For these reasons and because there was no thought or wish to confer a general power to issue bonds and then to superadd conditions *in pais* determinable finally by the officials and concluded by their recitals, as by the judgment of a court, the statute is mainly and in all substantials restricted and confined to and deals with matters not resting *in pais* and to be ascertained by perishable evidence in each given case, but with matters intrinsically and necessarily of record and ascertainable and determinable as well and as easily by intending dealers and purchasers as by the city officials.

There is no power given to refund the city indebtedness generally, but strictly and only that the evidence of which must appear and can only appear by the written and recorded action of the council. And then, carrying out the design, the notice of election is not, as usual, left *to the will, discretion, or caprice of the officials*, but must conform to the statute and distinctly specify the very writings and records evidencing the debt and the very bonds in every detail which, and which alone, can be issued and sold.

In this particular case the point is made still clearer, if

possible, by the course pursued. On one proposition the law is settled—that is, that no recitals can control or estop the municipality in regard to matters appearing on the face of the bonds. In the Sutliff case (147 U. S., 230) the statute required the officials in submitting the question to the voters to enter of record an order specifying the amount required, etc., and the court said that it was clear that the plaintiff, though a purchaser for value and before maturity, was charged with the duty of examining the record provided for in the statute in order to ascertain whether the bonds increased the indebtedness beyond the limit, and "that the "recitals in the bonds did not estop the county to prove by "the records * * * that the bonds have issued in vio- "lation" of the authority, etc., and that in such case there was no implication of authority in the officials to conclude the matter contrary to the facts so recorded.

Now, here, by a perfect parity of reasoning, the statute of 1893 required the officials in submitting the question to the voters, to enter of record a statement specifying the indebtedness to be refunded, etc., and equally all purchasers were bound to examine that record in order to ascertain whether the specified indebtedness was such as could be refunded, etc., and no recitals could estop or conclude in that regard. But there has never been any doubt as to whether a statement made or fact appearing on the face of the bonds, whether required to be made by statute or not, prevents a purchaser from relying on recitals to the contrary of that fact, if true. And so in the Sutliff case and other cases, some of which are there cited, it is held that when the amount of the bonds is stated on their face, that is sufficient to notify the purchaser. If, in this case, the notice of election had been copied into the bond in full, and so the bond had shown on its face its utter invalidity, it would not be, and is not contended there could be, any recovery. In such case, as, by necessary implication, is laid down in the Sutliff case, the purchaser is required to know the facts contained in the

records required by law to be made, and also whatever facts are stated on the face of the bond. And if, by putting both together, he can ascertain or must know *that the officials have exceeded their power*, he cannot recover. And in Chaffee *vs.* Potter, 142 U. S., 364, cited to the proposition, it is expressly said: "If the face of one of the bonds had disclosed that, as a "matter of fact, the recital in it, with respect to the constitu- "tional limitation, was false, of course the county would not "be bound by that recital, and would not be estopped from "pleading the invalidity of the bonds in this particular."

So, in McClure *vs.* Oxford, 94 U. S., 429–433, it is said: "These bonds, therefore, carried on their face unmistakable "evidence that the forms of law under which they purported "to have been issued had not been complied with. * * * "If a purchaser may be, as he sometimes is, protected by "false recitals in municipal bonds, the municipality ought "to have the benefit of those that are true."

The bonds in suit show on their face two things that are true: First. That they are issued for the purpose of refunding the *bonded* indebtedness of the city of Santa Cruz. Second. That they are issued in pursuance of and in conformity with *ordinances* of the city and of a notice of election given as required by the statute, and, therefore, reciting the indebtedness refunded.

Taking, then, the statute and the face of the bond together, as he must, the purchaser is charged with knowledge that it was only bonds and not warrants that were attempted to be refunded; that the election was called by *ordinance*, and that the ordinance recited and specified the particular bonds and was made a public record accessible to all, and kept in large, well-bound books; and also (though this is not essential here) that there were like public records by reference to which he could ascertain whether the bonds recited were outstanding.

B.

The Charter of Santa Cruz.

The act to reincorporate the city of Santa Cruz (approved March 11, 1876) provides, § 40:

"The city clerk must keep separately, in large, well-bound, uniform, and suitable books, an ordinance record in which shall be entered, in a good, round, legible hand, all the ordinances passed by the common council and approved by the mayor of the city of Santa Cruz, and said record shall be signed by the mayor and countersigned by the city clerk of said city" (p. 203).

If the statute of 1893 be read with the charter of Santa Cruz, we would have a statute somewhat similar to the following:

"The governing body of any city or town having an out-
"standing indebtedness, evidenced by bonds and warrants
"thereof, shall have power to pass an ordinance and enter
"the same in its ordinance record, which shall consist of
"large, well-bound, uniform and suitable books, kept at all
"times open for public inspection, calling, and prescribing
"the form of notice of, an election to determine the question
"of refunding such indebtedness. Such notice shall recite
"and describe the particular bonds or warrants to be re-
"funded, together with the denomination, character, time of
"payment, rate of interest, as well as all other details of the
"bonds proposed to be issued; and such recital and descrip-
"tion shall fix the denominations of the refunding bonds
"at not less than $100 and not more than $1,000, and the
"principal and interest as payable in coin or currency at
"the office of the treasurer or some designated bank, such
"interest not exceeding 6 per cent. per annum. If the re-
"quisite vote be in favor of refunding the indebtedness
"recited in said ordinance and notice, the bonds specified

"and described in said notice and ordinance shall be sold by "said governing body to the highest bidder for not less than "their face value."

In other words, the legislative authority under which these bonds were issued is just what it would have been under the statute supposed, and we have a case legally *identical* with Lehman *vs.* San Diego. The acutest and most subtle metaphysics cannot draw a distinction between a statute authorizing the officials of a town to issue or sell *the bonds* specified, recited, or described in an ordinance already passed and recorded and a statute giving them power to issue or sell *the bonds* described, recited, or specified in an ordinance thereafter to be passed and recorded and thereby authorized.

The unsubstantial and only distinction between Waite *vs.* Santa Cruz and Lehman *vs.* San Diego is that in the latter the governing body of the municipality, without previous authority, enacted an ordinance providing for the issuance of certain specified, described, and recited bonds in a specified mode and upon certain declared conditions, and the legislature afterwards ratified, confirmed, and made valid the ordinance, while in the former the legislature, in advance, enacted that the governing body should have power to enact a similar ordinance, and on its ratification by the electors might issue those specified, described, and recited bonds in the mode and upon the conditions set forth, recorded, and made certain in and by the terms of the ordinance, provided, however, that the ordinance should show on its face that the bonds to be issued were refunding bonds issued to take up previous indebtedness evidenced by bonds or warrants *of the city*.

It is obviously immaterial whether the legislature ratifies the ordinance, as in Lehman *vs.* San Diego, or authorizes it in advance, as in this case. The ratification is the equivalent, and cannot be more than the equivalent, of previous

authorization. The substantial points of resemblance, or, rather, of absolute legal identity, between the two cases cover the whole ground of debate. In neither was there given or conferred by the legislature any *general* power to issue bonds, coupled with conditions on the exercise of the power, the right to determine the existence of which conditions rested in *pais* or in parol and was committed to the decision of the governing body either expressly or by any implication.

The case of Lehman *vs.* San Diego, 83 Federal, 673, is but a corollary of Dixon County *vs.* Field. But why is this necessarily so? Because the principle established in Dixon County *vs.* Field, 111 U. S., 83, and Sutliff *vs.* Board, 147 U. S., 230, and kindred cases is that if the statute *expressly* requires the facts constituting the condition precedent to the authority to issue the bonds to be made a matter of public record, open to the inspection of every one, *there can be no implication* that it was intended to leave that matter to be determined and concluded, contrary to the facts so recorded, by the officers charged with the duty of issuing the bonds.

C.

The Decisions of the Supreme Court of California.

It is the rule of the Federal courts to construe the statutes of a State according to the rule of settled construction in that State, provided the Constitution or laws of the United States are not in any manner contravened.

Claiborne *vs.* Brooks, 111 U. S., 400.

Under the statutes and laws of California, and by intendment and construction of law, a statutory requirement that a certain fact shall be embodied in a resolution or ordinance is an *express requirement* that it be made a matter of public record, open to the inspection of every one.

In Wesson *vs.* Saline, 73 Fed., 919, it is said: "Common "councils, boards of commissioners, and like municipal "bodies can act only by order, ordinance or resolution, as "every one is bound to know."

Consequently, when a statute, as in the Lehman case, refers to an ordinance or resolution it means, *ex vi termini*, something appearing on a public record; and, by a perfect parallelism, the statute in this case (of 1893), by its reference to the notice of election, enacts and provides for a public record.

In Lehman *vs.* San Diego, the statute did expressly require the facts to be made a public record, simply because, under the statute, the facts were required to be contained in the proceedings of the board. The ordinance ratified gave the board authority to issue the bonds when and to whom such board *might by resolution direct*. The court said (quoting from McCoy *vs.* Briant, 53 Cal., 247): "Under the terms of "the ordinance, no bond could be issued or delivered ex- "cept upon a resolution of the board, *appearing upon its "minutes or the record of its proceedings*, thus furnishing a "most important safeguard against fraud and an abuse of "power. Every person dealing in the bonds is bound, at "his peril, to inquire whether they were issued in the mode "prescribed."

Lehman *vs.* San Diego, 83 Fed., 673.

This decision simply followed the settled law of the State. That California doctrine is "that the issuance of bonds is "not within the scope of the general and ordinary powers, "* * * and such bonds can be legally issued only "by virtue of express authority of the legislature;" that if issued without any authority at all, they are wholly void, and that "*the character of one void act of public officers can- "not be changed by a second void act of the same officers declar- "ing the first act to be valid.* That even a statute *expressly* "conferring the power to refund on the board or other offi-

"cials, and not like that of 1893, giving no *express* power to "do anything but *make up a record* of the action of the "electors or some other body or tribunal and couched in the "same language, to wit, 'having an *outstanding indebtedness* "'*evidenced by bonds or warrants thereof*,' does not fall within "'the line of judicial decisions in cases where the validity "'of municipal bonds depended on the happening of some "'precedent contingency of fact, and the question was, "'whether the officers executing the bonds were vested with "'the discretion or power to determine if the contingency "'had happened. * * * But * * * the validity of "'the bonds * * * did not depend upon any fact—any "'matter *in pais*—there was nothing left to the discretion of "'the officers, etc.'"

Sutro *vs.* Pettit, 74 Cal., 332.

And that "every person dealing in the bonds is bound, at "his peril, to inquire whether they were issued in the mode "prescribed; and as the mode is the measure of the power, "the bonds would be void in the hands of a holder for "value, without actual notice, if issued in any other mode."

McCoy *vs.* Briant, 53 Cal., 247.

Construing the statute of 1893 in the light of this doctrine, as was done with the statute in the Lehman case, how can the conclusion be reached that it was the intention of the legislature to commit to the city officials the power to decide whether the bonds refunded and recited in the notice of election were "outstanding bonds of the city," or to conclude by any recitals the question whether the limited and implied power so grudgingly conferred had been followed or exceeded or the mode prescribed disregarded? By adopting the language of the statute construed in Sutro *vs.* Pettit, it is elementary law that the construction was adopted with the language, and every variation between

the statute construed in Sutro *vs.* Pettit and the statute of 1893 but reinforces that construction.

It has been said in the cases in the Supreme Court of the United States decided before Dixon County *vs.* Field established the correct, if not a new, rule (see opinion of Brewer, J., in Potter *vs.* County of Chaffee, 33 Fed., 615) that if it be the law that certain facts must appear, the question is to whom must they appear and when? Who is to decide, etc.? But under the statute of 1893 these questions are easily and must be differently answered. By the express mandate of the statute they must be decided when the notice of election is framed and must then be made to appear on the face of the record. If the officials were to finally decide and embody their decision in the recitals, there was no necessity for reciting the facts in the notice of election, and even in the first instance all they could decide was whether to take the decision of the electors on the question of refunding certain specified bonds and issuing other specified bonds. Then, as soon as the electors decided the question submitted, the record was made up and the decision a finality. There is absolutely nothing in the statute from which can be implied any power to alter, vary, or depart from this decision. The whole *express* power given by the statute had been exercised and exhausted. Nothing remained but the *implied* power to issue the exact and very bonds described in detail in the recorded decision and action of another and different tribunal—the electors—passing on a definite issue and question made up and presented to them. Unless this be so it would follow that the statute gave an implied power to vary at will the details, amount, etc., of the *new* bonds, and to ruin the city by issuing them for any amount they saw fit. For this, we presume, no one would contend, and it is to us inconceivable that upon any construction of this statute the legislative intent was to commit to the city officials the power of deciding contrary to the facts plainly apparent on the face of the recorded notice of

election what particular bonds were to be refunded, and, by the self-same language in the self-same statute, to deny them the power to decide in like contrariety what particular bonds could be issued for the very and only purpose of refunding the particular outstanding bonds specified.

We beg leave to repeat and emphasize the controlling facts and consideration peculiar to this case and distinguishing it from all those decided by the Supreme Court which are cited against plaintiff in error on this proposition that by the statute (1893, p. 59) the whole of the first section down to the words "said bonds shall be sold by such city "council, etc.," deals *with the making of the record which is to evidence the decision and determination of the electors.* From the rest of the section must be *implied* all the power conferred with reference to the issuing of bonds, and that *implication* is limited and restricted and confined to the sale and issuance of the very and identical bonds required by the preceding provisions to be described in minutest detail in the record already made up. The statute is express on this point. It says "said bonds" shall be sold, etc., and it must be construed as if it had said, "The bonds so described in "said notice may be issued, sold, etc." Can you imagine any legislator or proposer or framer of an act intended to confer the power to make an unlimited issue of bonds, and to decide *de novo* and finally, without reference to any previous action, determination, or record, whether the facts giving the authority to make such unlimited issue existed, phrasing and wording the statute as this is expressed? The legislature is presumed to have known the existing state of the law, especially the previous decisions in California. If such dangerous and unfettered power had been contemplated; if it was the design to reverse the whole policy of the State and change the whole spirit of her jurisprudence, would the very language already construed not to confer this power have been adopted? Would such pains have been taken to cast aside and omit the express grant of

power to issue bonds contained in the very statute they were amending? Would any proposal to amend this statute of 1893, when on its passage, by *expressing* the grant of power here sought to be fastened upon it by implication and construction, have been even listened to or entertained for a moment? Imagine a legislature gravely providing for a decision by the voters of the question of issuing certain bonds to be specifically described and spread upon the public records; then, after giving authority to certain officials to sell those specific bonds and no others, inserting in the same section of the same act a proviso, as follows:

"Providing the city officials shall have exclusive and "final jurisdiction and authority to determine and decide "what the public record already exacted and provided for "does recite and contain, and any recital in the bonds sold "by them shall be conclusive evidence of the contents of "said record and shall estop the city from showing that the "bonds issued and sold are not those described in said "record, no matter how great may be the excess of the issue."

Cases Cited by Petitioner are Not Applicable, Because a General Power was Conferred on the Municipality.

In Hackett *vs.* Ottowa, 99 U. S., 86, there was a *general* power and jurisdiction conferred. The power was expressly given to borrow money and to issue bonds therefor. The court said: "No limitation is prescribed as to the amount "which may be borrowed. Nor is any express restriction "imposed as to the objects or purposes for which bonds may "be issued." There was no provision in the statute requiring the ordinance or the notice of election to contain any statement or recital as to the *purposes* for which the bonds were to be issued, or in any other way providing for any record of the facts made in obedience to express requirement of the statute. There was, therefore, nothing in the statute

or on the face of the bonds or in the recitals directing purchasers to any record of the facts. They were not required to know that there was a record showing whether the bonds were issued in compliance with the statute. They were expressly assured that there was none showing any failure to comply. The court said the bonds would have been good *if they had made no reference to the ordinance*, etc. But in our case these bonds would have unquestionably been invalid, without a reference to or recital of the notice of election. At least, there must have been a recital of compliance with the statute, which could have been held *ex vi termini* to import and certify that there was a recorded notice of election setting forth all the essential and jurisdictional facts which we contend show the want of jurisdiction and flagrant departure from the statute in attempting to refund private debts. All the case decided was that the recitals could not be contradicted *as to the purpose for* which the bonds were issued, where there *was no requirement* that such purpose should appear on the face of the proceedings. If the statute in Hackett *vs.* Ottowa, instead of giving a *general power* and jurisdiction, had provided that an ordinance might be passed, specifying the *purpose*, etc., and then that the bonds specified in the ordinance might be sold, etc., the case would have been something like this, instead of being as it is, its very antithesis, and under such a statute it must have been differently decided or overruled by the subsequent line of cases like Dixon *vs.* Field and the Sutliff case.

Risley *vs.* Village of Howell, 64 Fed., 453; 57 Fed., 544, is subject to the same explanation. It follows and is professedly based upon Hackett *vs.* Ottowa, from which it is said not to be distinguishable. In both cases, all that is decided is that the mere circumstance that an ordinance sets forth facts showing an unlawful *purpose* when there was no statutory requirement that it should say anything on the subject does not when recited impose on the purchaser the duty of examining something the statute gave him no warn-

ing would afford him any material or reliable information. By the statute and recitals in Risley *vs.* Howell, the purchaser (*that court thought*) had a right to conclude that the bond had been properly issued and sold in strict accordance with law, and that with the purpose or act of the municipal officers in the subsequent disposition of the proceeds of the sale he had no concern. In other words, that he was not bound to see to the application of the purchase-money. The pertinent thing in this case of Risley *vs.* Howell is the reference to the Sutliff case, which shows how the case would have been decided had the Michigan statute resembled ours. The reference then would have read: "The case of Sutliff "*vs.* Lake Co., 149 U. S., 230, is a case of the same character "as the one before us. The bonds in suit were part of an "issue in excess and violation and utter disregard of the "power and jurisdiction prescribed by the statutes; and, as "the public records, to which the purchaser had access, dis-"closed the lack of power, he is bound by the facts disclosed "by them, notwithstanding the recital in the bonds that they "were issued in conformity with the statute."

The remaining case cited on this point in the opinion of the court below is Evansville *vs.* Dennett, 161 U. S., 434. Much that we have said applies to this case. In addition, we may say confidently that it was not intended to overrule or in any way or degree detract from Dixon *vs.* Field, the Sutliff and like cases. If there had been any such thought, those cases would certainly have been, at least, alluded to, especially as they have been so often before and since mentioned and treated as embodying the settled doctrines of the Supreme Court. Evansville *vs.* Dennett is one of a class of cases in which a town, city, or other municipality had power to issue bonds under a certain charter or statute, and also erroneously claimed and assert power to issue them under some other statute. In such cases it is held that the recitals that the bonds are issued under the statute which does not in fact give the power do not invalidate the bonds if there was

some other power, charter, or statute under which they might properly have been issued. Thus in Evansville *vs.* Dennett there was power under the charter to issue the bonds on a petition of voters or tax-payers presented to the council. There was also a statute allowing the bonds to be issued pursuant to a vote previously had. The statute, in fact, as it turned out, was not operative, as having been repealed or for some other reason. The council, however, passed a resolution declaring that the bonds were issued under the statute and upon a vote, and the ordinance or resolution did not purport to show, and did not show, that any petition had been presented, and in fact none was presented. The question presented to the Supreme Court was whether a recital in the bonds that they were issued pursuant to an ordinance affected purchasers with notice of the terms of the ordinance, and imposed upon them the duty of examining the ordinance. It was held that it did not, and that the purchasers had a right to act upon the supposition that the ordinance conformed to the charter, the only valid statute conferring power to issue the bonds, and that, therefore, the requisite petition had been presented.

Now, evidently, this is simply following Hackett *vs.* Ottowa. There was nothing in the statute, or in any of the statutes, requiring the petition to state the jurisdictional facts and making such statement a matter of record, public or otherwise. Whether the petition was presented and whether it was a proper petition was left a matter *in pais*, and there was no requirement that any ordinance or resolution should in any way refer to it, or make it a matter of record. The decision that the recital implied and assured the purchaser that the ordinance complied with the statute, in the very nature of the case, could only be a decision that the ordinance contained everything that the statute required it to contain. It certainly did not and could not decide that if the statute had expressly required that the ordinance should recite the petition, the recital would imply that it did not

recite it. It may be that the recital implied and even proved that the petition had been presented. That would be simply because, as there was no express statutory requirement on the subject, the matter of the presentation of the petition was left *in pais* and to the determination of the officials issuing the bonds. The ordinance could fully conform to the statute and to every requirement of law, and still be utterly silent as to the presentation of the petition. It was the Hackett case over again. Simply that the gratuitous and unnecessary statement of a fact in an ordinance did not make the recital of that ordinance notice to the purchaser of the fact. The case must stand just as it would have stood if the ordinance had in all respects complied with the statute, and had not, without any requirement of the statute compelling it, stated any matters showing non-compliance with the law. In the case we are discussing, for instance, the ordinance stated erroneously and mistakenly that the proceedings were held under an invalid statute, and did not state a compliance with the charter. But there was no statutory requirement that the ordinance should say anything about either. The case is the same as if a council having perfect authority to issue bonds under a valid statute should foolishly and mistakenly and unnecessarily pass an ordinance reciting the provisions of an invalid statute, and that they were proceeding under that, and then issue the bonds with proper recitals that they were issued in conformity to the law, and also in pursuance of ordinances. The general recital would control according to Evansville *vs.* Dennett.

The language of the court in Evansville *vs.* Dennett, 161 U. S., pp. 413–4, clearly shows that we have correctly interpreted that case, and plainly distinguishes it from ours, and such cases as Dixon *vs.* Field and the Sutliff case, which are not mentioned or referred to, as they certainly would have been had the statute of Indiana been anything like ours. This, we submit, is self-evident, unless some reasonable and

sensible distinction can be drawn between a statutory requirement of a public record accessible to *all*, and contained in legible, well-bound books, kept by the city itself, and any other public record like that of assessed valuation, registry of voters, etc., passed upon in the cases relied upon by petitioner. And even such a distinction would not reach the record in the Sutliff case. But there is no such distinction. *All the reasons* given apply equally to any "express and definite record of a public character." As appears from the language above referred to (161 U. S., 443-4), there were two statutes—one invalid, providing for an election; the other, the charter, valid, but requiring a condition *in pais*, nowhere required to be recited, or embodied in any record of any kind or nature—to wit, a petition of two-thirds of the resident freeholders. The court thought that the question whether there was a petition, whether it was signed by the requisite freeholders, etc., like other conditions *in pais*, was *intended by the legislature* to be left to the determination of the officials; that it was not necessary, or required by the statute, that such determination should appear of record or by ordinance or otherwise than by a recital in the bonds; that a mere recital of compliance with the charter concluded the question; and that though there was an unnecessary and superfluous recital of an ordinance, the purchaser had a right to assume, even if he had seen the ordinance, that the election under the invalid statutes was a harmless surplusage; and that, as recited, both methods were pursued, and both the valid and invalid statutes complied with. The ordinance did *not* show, as does the notice of election in the case at bar, *affirmatively*, a want of jurisdiction or abuse of power. It merely *failed* to show or make matter of record a fact which no statute required the ordinance even to allude to, and which the statute did not contemplate the entering of upon any record. According to the views of the court, the bonds would have been equally good, if the ordinance had been equally silent as to the petition

and the election, and the recital had simply been of compliance with the charter, omitting all reference to the invalid statute and the ordinance. This was merely following the Hackett case. The holding that the recital imported that the ordinance was in conformity with the statute is entirely consistent with the doctrine of Dixon County *vs.* Field, the Sutliff case and like cases. In those cases an express recital that the records in question existed and fully conformed to the statute requiring and providing for them would not have varied or influenced the result, except by furnishing an additional ground for the same decision. If the express recital in the case at bar of the notice of election imports its conformity with the statute prescribing its contents, it thereby imports that the record thereof absolutely furnished the exhaustive and conclusive proof of the power of the officials in regard to issuing the bonds, and the sole test of the regularity of its exercise. It does not present a case like Evansville *vs.* Dennett, where, notwithstanding the ordinance recited fails to show the power and jurisdiction affirmatively, there was still another source of power not alluded to in the ordinance under which the proceedings might have been regular, and which did not require the facts calling it into existence, and justifying the action taken, to be specially or otherwise recited and spread on the records. What would have been the answers to the questions in Evansville *vs.* Dennett, even under the Indiana statute and the Indiana decisions and jurisprudence relied on and followed, if the ordinance had shown affirmatively a lack of power and jurisdiction under both the statute and the charter, we need not consider further. We think nothing special need be said concerning the decisions, other than those relied upon by Judge De Haven, which have been cited by counsel; because, we submit, what we have already advanced applies to and covers them all. In so far as they agree with and follow the decisions of the Supreme Court, it certainly does; and if there be any inconsistent

therewith, which we think there are not, they are not authority here.

We may add, however, that in City of Huron *vs.* Second Ward, 86 Fed., 280, it is said: "The power granted by the "charter of the city of Huron is plenary. It was *general*, "*not special*. It was not limited to specified purposes, etc."

National Life Ins. Co. *vs.* Board, 62 Fed., 789, is fully in line with our contention, and well illustrates the differences between this case and all those cited against that contention.

The law always has some reference to common sense and the actual transaction of affairs. No man in his senses would or could in good faith invest in bonds under such a statute as ours without first investigating the notice of election, ordinance, etc. No lawyer would attempt to pass the bonds without calling for these documents. He would, after the first glance at the statute, see that the only power was to sell the particular bonds detailed in the record authorized by law. And, in fact, we find the very first thing called for and examined here was this very record.

III.

THERE WAS AN OVERISSUE OF BONDS, OF WHICH ALL PURCHASERS HAD NOTICE.

It is admitted by the pleadings that the assessment of the city of Santa Cruz for the year 1894 was $3,907,404. If the water-bond issue of $89,000 for a private corporation be excluded, the apparent bonded debt of the city is $630,000; or if the $89,000 water-bond issue be included, it will be $720,000. Under any feature of the case, the issuance of bonds should not be more than 15 per cent. of the assessment, to wit, $586,110. A purchaser of bonds buys with his eyes open, and is presumed to know that the statutes in force at the time become a part of the contract. It is the

policy of the State of California, expressed by the constitution, to keep its municipalities free from debt. It is, therefore, mandatory on investors to examine all laws which enter into the contract between its people and their creditors. The new constitution of 1879 gave ample notice of the fact that safeguards would be thrown around municipalities. In section 18, article XI, it provides that "No county, "city, town, township, board of education, or school district "shall incur any indebtedness or liability, in any manner, "or for any purpose, exceeding in any year the income and "revenue provided for it for such year, without the assent of "two-thirds of the qualified electors thereof, voting at an "election to be held for that purpose, nor unless before or at "the time of incurring such indebtedness, provision shall "be made for the collection of an annual tax sufficient to "pay the interest on such indebtedness as it falls due, and "also provision to constitute a sinking fund for the payment "of the principal thereof on or before maturity, which shall "not exceed 40 years from the time of contracting the same. "Any indebtedness or liability incurred contrary to this "provision shall be void."

In order, if possible, to make its provisions more far-reaching, the statute of 1891 was passed, limiting the contraction of debt to a certain percentage of the assessed value, as follows (Statutes 1891, p. 84, amending an act limiting the contraction of indebtedness, section 5): "No city, town, or mu- "nicipal corporation shall incur an indebtedness for public "improvements which shall in the aggregate exceed fifteen "(15) per cent. of the assessed value of all the taxable real "estate and personal property of such city, town, or munici- "pal corporation." Besides, the charter of Santa Cruz (Statutes 1875–'6, p. 193, in section 10 of said act) is very explicit on the proposition: "The common council shall not "create, audit, or allow, or permit to accrue, any debt or lia- "bility above the actual revenue or available means in the "treasury that may be lawfully apportioned and appropri-

"ated for such purpose; nor shall any warrant be drawn, or "evidence of indebtedness be issued, unless there shall be "sufficient money in the treasury legally applicable to meet "the same, except as hereinafter provided."

Caveat Emptor is the Rule in These Investments.

A person dealing with a municipal corporation must ascertain at his peril if it is exceeding the limitation of its indebtedness. He must determine for himself whether or not the proposed debt will cause the municipality to exceed the constitutional or statutory limitation. Thus, in Iowa the constitution, article XI, section 3, limited indebtedness as follows: "No municipal corporation shall be allowed to "become indebted in any manner, and for any purpose, to "an amount in the aggregate exceeding five per cent. on the "value of the taxable property within such corporation, to "be ascertained by the last State and county lists previous "to the incurring of such indebtedness."

In construing this provision, the supreme court of Iowa, in Scott *vs.* Davenport, 34 Iowa, 208–212, said: "The language "of the constitution is broad and sweeping. * * * It "includes all debts incurred in any manner or for any pur- "pose. It says, in effect, that whenever the corporate in- "debtedness, in the aggregate, shall amount to 5 per centum "on the taxable property within the corporation, no further "indebtedness shall be allowed to be created in any manner "or for any purpose."

Original Debt Incurred for Improvements.

There is another point to be considered. It is this: The original indebtedness was principally incurred for improvements, namely, water works for Santa Cruz. For that purpose, the sum of $300,000 was voted by the citizens of Santa Cruz. The point must be considered in view of the fact that

petitioner tries to draw a distinction between refunding and improvement bonds. Assuming the reason to be correct, the fact that the issue was a renewal and refunding issue, to take up improvement bonds, should have placed intending buyers on their guard. It renders the argument of counsel valueless. The correspondence between the Northern Counties Investment Company and Coffin & Stanton illustrates the point effectively. We quote from admissions, pages 100, 101:

"COFFIN & STANTON: Your letter of the 26th, proposing "to substitute city of Santa Cruz 5 per cent. bonds for city "of Santa Cruz water bonds, has been considered at our board "meeting this afternoon, when a disposition was evinced to "oblige you. Before giving a definite answer, however, we "should like some further explanation with respect to the "statement in the particulars you have sent, intimating that "the 5 per cent. bonds are issued to refund bonds for water "supply. Does this mean that the 5 per cent. bonds are in "substitution for the 6's we already hold, or does it indicate "that there are two sources of supply, one owned by the city "and the other by the Water Co.?"

In answer, Coffin & Stanton wrote: "We beg to acknowl- "edge the receipt of your favor of the 28th inst., and, in "reply thereto, would state that at the time the water works "were built in the city of Santa Cruz, the law authorized "the city to issue only about $300,000 bonds for this purpose. "As the works cost about $400,000 to build, it was necessary "to form a company which should issue its bonds for this "$100,000, retaining a lien upon the city's plant for their "security. It is these bonds which you now hold. Since the "time of the building of the works, the State laws of California "have been so changed that the municipality is now able "to refund the former municipal bonds (which were payable "one-twentieth each year for twenty years) into a new bond, "payable one-fortieth each year for forty years. And the "law has also been so changed that the city is now legally

"in a position to issue a sufficient number of bonds to pro-
"vide for the cancellation of the old Water Co. bonds, such
"as you now hold. There is but one source of supply, and
"the issue of municipal bonds which we now propose to give
"you in place of the Water Co. bonds will enable the retire-
"ment of the Water Company bonds, thus leaving the mu-
"nicipal bonds the only lien upon the property. We believe
"the securities offered to be in every respect as desirable as
"those now held by you, and trust you will see your way to
"give us a favorable reply to our request." The statement by Coffin & Stanton that there would be a retirement of the water bonds, thus leaving the municipal bonds the only liens, was false. The old issues were unpaid.

No Retirement of the Old Bonds Took Place, and Santa Cruz is Face to Face with a Debt of $660,000 *or* $720,000.

Such an overissue is invalid. In the refunding case of Doon County *vs.* Cummings, 142 U. S., 368, in which there was a similar state of facts, it was held that negotiable bonds, in excess of the constitutional limit, issued by a school district and sold by its treasurer for the purpose of applying the proceeds of the sale to the payment of the outstanding bonded indebtedness of the district, pursuant to the statute of Iowa, were void as against one who purchased them from the district with knowledge that the constitutional limit was thereby exceeded. There, the limitation of the constitution was 15 per cent. of the value of taxable property. There, too, refunding bonds were issued to take up old indebtedness. The court said, p. 372: "If new bonds are issued without a cancellation or surrender of the old ones, the aggregate debt outstanding and on which the corporation is liable to be sued, is at once necessarily increased, and if new bonds equal in amount to the old ones are so issued at one time, it is doubled; and that it will remain at the increased amount until the proceeds of the new

bonds are applied to the payment of the old ones, or until some of the obligations are otherwise discharged. It is true that, if the proceeds of the sale are used by the municipal officers, as directed by the statute, in paying off the old debt, the aggregate indebtedness will ultimately be reduced to the former limit, but it is none the less true that it has been increased in the interval; and that, unless those officers do their duty, the increase will be permanent. It would be incumbent alike with the words and with the object of the constitutional provision, framed to prevent municipal corporations from being loaded with debt beyond a certain limit, to make their liability to be charged with debts contracted beyond that limit, depend solely upon the discretion or the honesty of their officers" (p. 372). In this case all refunding bonds in excess of the limitation were declared absolutely void. So held where an issue exceeded 10 per cent. of assessed value (Dixon County *vs.* Field, 111 U. S., 95). So held in a case from Colorado, where the recital stated that "all the provisions and requirements of said act had been "fully complied with by the proper officers in the issuing of "these bonds" (Lake Co. *vs.* Graham, 130 U. S., 674). So, too, in a case from Illinois, where the indebtedness of a city was increased by a new issue of bonds beyond the 5 per cent. limitation, although there were recitals (Buchanan *vs.* Litchfield, 102 U. S., 278). In Sutliff *vs.* Lake County Commissioners, 147 U. S., 230, the distinction was clearly drawn between the cases where the overissue was held valid, as in Marcy *vs.* Oswego, 92 U. S., 637; Humboldt Township *vs.* Long, 92 U. S., 642, and those where the overissue was held void. In the former (92 U. S.), certain commissioners were given the power to decide on the amount to be legally issued by the municipality. The records were not open to the world. In other words, these officers determined whether the facts existed which constituted the statutory or constitutional conditions precedent, and the law did not require the facts to be made a matter of public record. To quote (147

U. S., 235): "But if the statute expressly requires those facts "to be made a matter of public record, open to the inspection "of every one, there can be no implication that it was in- "tended to leave that matter to be determined and concluded "contrary to the facts so recorded by the officers charged with "the duty of issuing the bonds." The overissue was, therefore, held invalid. All these cases reiterate the rule that he who contracts with a municipality, whereby an indebtedness is created, must take notice, at his peril, of its financial standing and condition, and examine if the proposed indebtedness is in excess of the limit allowed by law (Doon County *vs.* Cummings, *supra*). Any other rule leaves the tax-payer at the mercy of the municipality and the contractor, and would render the constitutional or statutory provisions null and void (15 Am. & Eng. Ency. Law, 1124).

But it is still urged that there is a distinction to be taken between improvement bonds and refunding bonds. It is urged that there is a limitation in the case of the former, but none in the case of the latter. In answer to this, it can be said: If there were no debts there would be no refunding. Refunding means that all debts at a high rate of interest will be paid on terms more satisfactory to the municipality, both as to time and rate of interest.

Refunding applies to all kinds of indebtedness. It includes improvement bonds as well as other evidences of debt. If it were otherwise the term would be a misnomer. It is well settled that the prohibition of indebtedness applies to all forms of debt over which the municipality has control, and includes both express and implied as well as floating and bonded indebtedness.

Litchfield *vs.* Ballou, 114 U. S., 190.
Simonton on Bonds, sec. 54.

Indebtedness is an agreement of some kind by the city to pay money where no suitable provision has been made for the prompt discharge of the obligation imposed by the agree-

ment. It was obviously the intention of the legislature in submitting and the people in adopting the constitution to arbitrarily restrict the power of municipal corporations to contract debts to a limited per centum of their taxable property, and to require, when that limitation has been reached, that such corporations shall be prepared to pay for whatever value they may obtain, without the inconvenience of any further indebtedness for any purpose whatever.

Sackett *vs.* City of New Albany, 88 Ind., 473.
Simonton on Bonds, sec. 55.

In construing these constitutional and statutory provisions attention must be paid to their terms. Limitations imposed by the constitution on the power of municipal corporations to contract debts should be construed with reference to existing facts and with a view to the practical working of that instrument, and such a literal construction as would defeat the object to be attained should not be adopted.

Law *vs.* People, 87 Ill., 383.

Statutes Enter Into All Contracts.

It is argued that a constitutional prohibition has more force than a statutory one. This is possible. Yet both are the expressions of popular will and both enter into all contracts made after their adoption by the people directly or by their representatives. No case can be found which holds that statutory limitations are not binding where the statute, the assessed valuation, and the public record of the debt referred to in them disclosed the entire absence of power to issue bonds, of which facts all intending purchasers were bound to take notice. Thus, in Broadway Savings Inst. *vs.* Town of Pelham, 83 How., 102, it was held: "The "statute made it the duty of the town clerk to keep a record "of the certificates and the amount and time of their pay-

"ment. The record was open to inspection, and an exam-
"ination of it would have disclosed to the plaintiff the fact,
"not only that the particular certificates in controversy were
"unauthorized, but also that the power of the town officer
"had been exhausted by borrowing the actual amount of
"the unpaid taxes upon other genuine certificates. The
"plaintiff was held chargeable with notice of the provision
"of the statute, and its failure to make an examination of
"the record deprives it of the standing of an innocent holder
"of the securities."

Thompson *vs.* Town of Mamakating, 37 How., 410; 106 N. Y., 674.

In respect to the amount of the certificates no distinction can be drawn between the case at bar and that last cited. In that case it appears that the town was authorized by statute to issue bonds to the amount of $175,000. The bonds sued for were in excess of that amount, and had been issued by mistake. Although the plaintiff was an innocent purchaser for value, without notice of the defect, the right to recover was denied upon the ground that he was chargeable with notice of the limitation put by the statute upon the power of the town commissioners, and was bound to ascertain, at his peril, that all the conditions requisite to the execution of their power had been observed and performed.

Recitals Necessary to Cause Estoppel.

It is claimed, however, that the recitals estop the municipality from claiming an overissue. The answer is that the rule now followed in the State and Federal courts is this: If it can be ascertained that the issue was in excess of the constitutional or statutory limitation, the bonds will be declared invalid, notwithstanding any recitals, unless the recitals, in express terms, state that the issue is not in excess of the constitutional or statutory limitation, and the amount

of the issue of the bonds is not ascertainable from the bond itself. The cases will be briefly mentioned:

In Buchanan *vs.* Litchfield, 102 U. S., 278, a case from Illinois where the water works were to be constructed by sale of bonds under a statute and ordinance, the bonds did not state that the proposed indebtedness was within the legal limit. The bonds were held void.

In Dixon County *vs.* Field, 111 U. S., 83, a case from Nebraska, in which there was an overissue of bonds, it was held that there was the same defect, and the same ruling was followed. The above case established the doctrine that where the limitation is based upon some public record, as the assessment-rolls, and the amount of the debt which may be incurred is a certain per centum thereof, or a given rate of taxation based thereon, then any purchaser of bonds or other paper is chargeable with notice of the amount of debt that can legally be incurred, and when that debt is evidenced by municipal paper, which on its face disclosed the total amount of paper issued, the purchaser must consult the assessment-roll, and from that he must ascertain, at his peril, after examining the constitutional limitation (as every purchaser is bound to know all the laws under which municipal paper is uttered), whether or not the total issue of paper exceeds the constitutional limit.

This case was followed by:

Quaker City Nat. Bank *vs.* Nolan Co., 59 Fed. Rep., 660.

Sutcliffe *vs.* Board, 147 U. S., 230.

Francis *vs.* Howard Co., 54 Fed. Rep., 487.

Lake Co. *vs.* Rollins, 130 U. S., 662.

Lake Co. *vs.* Graham, 130 U. S., 674.

Nesbit *vs.* Riverside Ind. Dist., 144 U. S., 610.

Hedges *vs.* Dixon County, 150 U. S., 182.

Records the Best Evidence in Bond Issues.

The supreme court of Texas, in Citizens' Bank *vs.* City of Terrill, 78 Tex., 456, thus refers to the effect of recitals on overissued bonds: "Where the authority to create the debt "at all, or beyond a gross amount, is made to depend upon "evidence furnished by official records, the same rule in "regard to recitals contained in bonds given for the debt "should not be applied. Every holder of such bonds is "charged with a knowledge of the provisions of the law "relating to their issuance, and if the law points to the "record as evidence of the existence of the facts required to "authorize their issuance, or to limit the amount of the "debt the city may create, such records, and not the "recitals in the bonds, must be looked to by every one "who proposes to deal in the bonds." See also Quaker City Nat. Bank *vs.* Nolan Co., 59 Fed. Rep., 660.

In Millsaps *vs.* City of Terrill, 8 Circuit Court of Appeals Reports, 557 (decided February, 1894), a water-works case, where a city had issued bonds to such an extent that the interest and sinking fund absorbed the whole of such tax, and then issued another series, and provided that the interest and sinking fund should be appropriated out of the general revenue of the city, the court, after holding that the first issue of bonds to the full amount authorized by the constitution exhausted its power to contract debts, and the additional issue was void without regard to its authority to apply its general revenue to the payment of interest and sinking fund of a bonded debt, said: "When we "consider, in addition, the well-settled proposition, that no "municipality can create a debt unless the power to do so is "either expressly or impliedly conferred upon it by law, it "seems clear that, in the case at hand, the coupons sued on, "as well as the bonds to which they were accessories, having "been issued by the city of Terrill for permanent improve-

"ments, after the power to create debts for such purposes "was exhausted, were void for want of power in the munic- "ipality that issued them (p. 577)."

And it is further said: "If we were without authority on "the subject, we are inclined, on principle, to the opinion "that it is against public policy to permit the necessary ali- "mony (made up of revenue) of any city, however small "such city may be, to be bargained away beyond the year "for which it is assessed and is applicable."

Again, in Francis *vs.* Howard Co., 54 Fed. Rep., 487, it is said: "All the decisions of the Supreme Court of the United "States, from Dixon Co. *vs.* Field, 111 U. S., 83, to Sutliff *vs.* "Board, 147 U. S., 230, agree that the purchasers of bonds "issued by municipalities, under authority of laws which "limit the amount of bonds to be issued to a certain percent- "age of the assessment-roll, or to a given rate of taxation on "such rolls, are charged with notice of the amount of the "bonds which can be validly issued, based on such assess- "ment-rolls."

The result of a review of the authorities in reference to the creation of an estoppel as to overissue is: There must be in the bond a recital to the effect that the total amount of the issue does not exceed the limit prescribed by the laws or constitution of the State. This is the doctrine of the leading case of Chaffee *vs.* Potter, 142 U. S., 355. Here bonds issued in excess of the constitution of Colorado were held valid in the hands of a *bona fide* holder for value because they contained a recital that the issue was not in excess of constitutional limits.

Following the decision in the Chaffee case, it was held in National Life Insurance Co. *vs.* Board of Education, 10 Circuit Court of Appeals, 637 (July, 1894), that the following recital acted as an estoppel: "And it is hereby certified and "recited that all acts, conditions, and things required to be "done precedent to and in the issuing of said bonds, have "duly happened, and been performed in regular and due

"form as required by law, and that the total amount of this "issue of bonds, together with all other outstanding indebt- "edness of said board of education, does not exceed the stat- "utory or constitutional limitation."

There is no such declaration in the Santa Cruz bonds; hence, there is no estoppel, and the bonds must be held invalid on account of the overissue.

Rule in California.

In this State the doctrine that all overissued bonds are void is well settled. Where an act authorized a county to erect a court-house for a sum certain, and bonds for a greater amount were issued, negotiable in form, and sold to *bona fide* purchasers, the overissue was held void. Refunding bonds subsequently issued by the county in place of such overissue were also declared void.

Sutro *vs.* Petit, 74 Cal., 332.

Purchasers of municipal bonds are bound to know the power of municipal corporations and of their officers by whom the bonds were issued; and as the statute requires all county bonds to be recorded, and the fact of the overissue can be readily ascertained from the number of the bonds, any mistake of the purchaser of overissued bonds, as to the validity of the bonds, is a mistake of law from which he cannot be released. So held in Sutro *vs.* Rhodes, 92 Cal., 117.

In the same case it was held: "Where overissued bonds "are sold in good faith, without any express warranty of "their legal validity on the part of the vendor, there is no "implied warranty thereof, but the rule of caveat emptor "applies, and the purchaser cannot recover the purchase- "money paid." It was, as a result, held that the act of March 25, 1868, in relation to the funded indebtedness of Calaveras county having expressly limited the issuance of bonds for such indebtedness, all overissued bonds in excess of such

sum were illegal and void, and did not bind the county, though negotiable in form.

Sutro *vs.* Rhodes, *supra.*

The Effect of the Overissue in the Case at Bar.

It is well settled that bonds issued in excess, or partly in excess, are void in all hands. When the bonds are in excess, in whole or in part, of the constitutional limit, or without a vote, when required by the constitution, and the valid cannot be separated from the invalid, the Federal courts hold that no action for money had and received would lie against a municipal corporation. * * *

Simonton, Bonds, sec. 238.

Equity will not grant relief to the holder of such bonds.

Litchfield *vs.* Ballou (Water Works), 114 U. S., 190.

Hedges *vs.* Dixon Co., 150 U. S., 182.

If the municipal corporation did not have the authority to do the work and make the public improvement, or if the money was not obtained for a public object, which the municipality had authority to do, but the money was used for some purpose about the doing of which the municipality had no authority to act, then the holder cannot recover at all. The whole issue will be held invalid, if the transaction is one and indivisible.

Simonton on Bonds, sec. 237.

15 Am. & Eng. Ency. Law, p. 1137.

Millerstown *vs.* Frederick, 114 Pa. St., 435.

Hedges *vs.* Dixon Co., 150 U. S., 182.

Not even ratification will make good, bonds issued beyond the lawful limit.

Davies *vs.* Dickinson, 117 U. S., 657.

McPherson *vs.* Foster, 43 Ia., 48.

IV.

THE 150 BONDS HELD BY WALLACE & CO. WERE ACQUIRED AFTER A KNOWLEDGE OF THE ILLEGAL CHARACTER OF THE ISSUE.

The present suit brought by Waite for collection affects only nine of these Wallace bonds and some coupons, but the same evidence of notice applies to all. The testimony of S. Wallace, Walter Stanton, Turney, his clerk, and the letters of Prince & Co., show clearly that Prince & Co. were the agents of Wallace to sell certain belting stock; that Prince arranged to do so with Coffin & Stanton at 85 cents on the dollar, provided the Wallaces accepted 150 Santa Cruz refunding bonds at par for the balance due. This the Wallaces did, and paid Prince & Co. $2,500 for their services. The amount paid in cash by the Wallaces was $118,000. Prince & Co. advanced $100,000 and took the 150 Santa Cruz bonds as security. The fact that the Wallaces were parties to the transaction and now own the bonds is admitted, but it is contended that Prince & Co. were the agents of Coffin & Stanton and had no such relation to the Wallaces. It is conceded if Prince & Co. were their agents the knowledge of Prince & Co. was theirs, and notice to them was notice to the Wallaces. It is claimed, however, that the Wallaces were *bona fide* purchasers, who depended on the recitals in the bonds only, and did not ask for further information in reference to the validity of the bonds; that the act of Prince & Co. as agents in demanding full papers, full copies of the ordinances and resolutions of Santa Cruz in reference to the bond issue, did not bind them as principals. But the evidence of Sumner Wallace alone shows the contrary. The letters of Prince & Co. were also produced, and tell the true story. Not satisfied with

the opinion of Z. N. Goldsby, the city attorney of Santa Cruz, as to the validity of the bonds, and the further opinion of Lafayette Gleason, an attorney of New York, Mr. Wallace insisted that a Mr. Dickinson, attorney for the American Title and Trust Company, be retained. He demanded more papers. More papers were given. All the ordinances and orders of the Santa Cruz council were produced. He reported favorably. Prince & Co. furnished the opinion of their own private counsel, Story & Thorndike (Prince's test.). More than that, the Wallaces advised with Rollin & Co., dealers in bonds, as to the validity of this Santa Cruz issue before they were satisfied. This is made clear by the evidence of Mr. Sumner Wallace. He testified: "All these opinions were procured by Prince & Co., or by "Coffin & Stanton. The Goldsby and Gleason opinions were "submitted to us without consultation with us, but the Dick- "inson opinion was obtained after by agreement, after I had "said to Prince & Co. *that I wanted an opinion from Dickin-* "*son.*"

Agencies for Two Parties.

It is claimed that notice to an agent, in this case Prince & Co., is no notice to his principal where the agent's relations on the subject-matter render it probable that he will not disclose the facts to his principal. In the case at bar there was no evidence that Prince & Co. did not disclose all the facts of the Santa Cruz bonds shown by the certified copies of the papers and ordinances submitted to the various attorneys. On the contrary, there was no secret about the matter. In fact, Sumner Wallace insisted that his attorney, Mr. Dickinson, should examine the proceedings, and, further, the firm made inquiries of the firm of Rollin & Co. Moreover, in this State it is well settled that there can be no presumption that an agent of two parties will deal unlawfully with either, and it is only when the agent has personal interests

conflicting with those of his principal that the law requires peculiar safeguards against his acts.

Pauly *vs.* Pauly, 107 Cal., 8.

In the case at bar there was no reason for precaution. Assuming, for the sake of argument, that Prince & Co. were the agents of both parties, which we deny, as it appears they were only agents for Wallace, who paid them a commission of $2,500, it does not appear that they were acting fraudulently and adverse to the Wallace interest when a loan of $100,000 was made by them to the Wallaces, secured by these Santa Cruz bonds. This in itself is sufficient evidence that they were acting in good faith and believed the opinions of the attorneys were correct in reference to the defects in the entire issue of bonds. It is certainly the best kind of proof that they were acting fairly. Men do not loan $100,000 on what they believe is poor security.

During the trial Judge De Haven thought that notice was given to Wallace. Here is a transcript of the stenographer's notes.

On page 267, volume III, of the typewritten testimony we read:

Mr. MAGUIRE: We will call your honor's attention at the proper time to the evidence of Wallace that Prince was his agent in the transaction.

The COURT: He was either acting for himself or for some one else. If he was acting for himself he had notice of whatever was brought to his attention. If he was acting for some one else his principal had notice through him.

Yet the court held and found as a fact that notice to Prince & Co., the agents of the Wallaces, was not notice to them, because Prince & Co. are to receive a commission from Coffin & Stanton in the same transaction. In other words, compensation prevents the imputation of knowledge to either

principal; but the contrary doctrine is held in a California case.

Witter *vs.* McCarthy, 43 Pac. Rep., 969.

See also—

Surety Co. *vs.* Pauly, 170 U. S., 149–159.
Bradley *vs.* Riches, 9 Ch. Div., 189.

The cases cited by counsel for Waite in reference to the employment of attorneys do not meet the point, for the reason that in no case were the attorneys' services requested by the person to be charged with notice. In this case Dickinson's opinion was an imperative necessity, such as Judge Dillon's would be to his clients upon some point of municipal corporate law. Cases might be multiplied *ad nauseam*. To render the facts clear, a brief digest of the evidence will be given. First, the letter of Prince & Co. to Coffin & Stanton will explain the commencement of the trade:

F. H. Prince & Co., bankers and brokers, 2 and 8 State street.

BOSTON, *Sept.* 22, 1894.

Messrs. COFFIN & STANTON, *New York, N. Y.*

GENTLEMEN: We have arranged a trade for you with Messrs. E. & E. G. Wallace, as follows:

We have sold $150,000 City of Santa Cruz, Cal., bonds at par, you to deliver the bonds of the earliest date of maturity which you hold on Tuesday next and $150,000 City of Ironwood, Mich., 6 per cent. bonds at 105 and interest, you agreeing that the legality of the City of Ironwood bonds shall be satisfactory to Judge Dillon and a legal opinion obtained from him to that effect, and if not from him from such lawyer as may be agreeable to us. You are to take, in part payment of the above bonds, 520 shares of common and 350 shares of preferred stock of the Page Belting Co., at 85 per cent. of its par value, as follows: Half on the delivery of $150,000 City of Santa Cruz bonds and the other half on the delivery of the $150,000 City of Ironwood bonds, you to

deposit with us $10,000 City of Waco, Tex., first-mortgage Water Co. 6 per cent. bonds and the 435 shares of Page Belting Co. stock received by you on delivery of the $150,000 City of Santa Cruz bonds as surety that you will perform in full the above agreement in delivering the $150,000 of City of Ironwood bonds on the condition above named and receive the remaining one-half of the Page Belting Co. stock—that is, 435 shares—as part payment thereof. The balance of purchase-money for each lot of bonds is to be paid in cash on the delivery of bonds.

Please confirm the trade by signing the enclosed letter and returning same to us forthwith.

Very truly yours, F. H. PRINCE & Co.

Frederick Prince, of Prince & Co., testified that he loaned Wallace & Co. $100,000 to pay for the Santa Cruz bonds. He held these bonds as security for the loan. "Coffin & Stanton sent us all the papers relating to the use of the Santa Cruz refunding bonds and we submitted them to Mr. Dickinson. Coffin & Stanton always sent a very full set of papers—votes, and so forth. It is customary in selling bonds in Boston to give a Boston lawyer's opinion in reference to the same. The opinions of the California lawyer and the New York lawyer were sent to him with the papers of Coffin & Stanton. I think Dickinson gave us his opinion. * * * After we originally got the papers from Coffin & Stanton Dickinson asked for certain papers which we sent for to Coffin & Stanton, and they sent them to us. That was *subsequent* to the *first papers* sent and before *Dickinson gave his opinion.*"

Walter Stanton testified that papers were sent, and Mr. Prince stated that they had been placed in the hands of attorneys Story and Thorndyke. The full record of the Santa Cruz proceedings was sent to Prince & Co.

Turney, the chief clerk in Stanton's office, testified that the papers were selected by Mr. Stanton and himself, and either forwarded by him or under his supervision to Prince & Co. He recognized the papers contained in the package

marked "Santa Cruz refunding bonds," "Full transcript of proceedings." "Notice of special election" was included; so, too, ordinances 315, 317, 318, 320, &c., &c.; notice of special election; also statement of population and valuation of the city of Santa Cruz, &c.

Sumner Wallace testified that he was one of the firm of Wallace & Co., the buyers of the Santa Cruz bonds. Prince & Co. submitted the opinions of Goldsby, of Santa Cruz, and Gleason, of New York.

"*This was not satisfactory to us, and we asked for the opinion of some attorney in Boston, and decided to refer it to Mr. M. F. Dickinson, of the American Loan and Trust Company, and the opinion was obtained that I have here. The opinion being favorable, I purchased the bonds.*" Made an inquiry as to the value of these bonds as a financial proposition from E. H. Rollins & Sons, bankers and bond dealers, Boston. On cross-examination, he said: "My uncle made no investigation. He left it all to me. I wrote the first proposition to Mr. Prince, and had a talk with him some time in August. * * *

"The Goldsby and Gleason opinions were submitted to us without consultation, but the *Dickinson opinion was obtained after by agreement, after I had said to Prince & Co. that I wanted an opinion from Dickinson.*"

In reference to the point that there is no clear presumption that the agent would not communicate, see—

1 Encyclopædia, E. & A., p. 1145.

Loring *vs.* Broder, 134 Mass., 458.

In re Pilkington Bank, 58 N. W., 784.

Kind of Notice Immaterial.

Our position is this: If Wallace & Co. or any purchaser received any information of a defect in the bonds, that is sufficient of itself to put him on inquiry as a prudent man.

No matter how this information is acquired, by agents or otherwise, it is fatal to the claim of being an innocent purchaser.

The law concerning notice of defects to the bondholder is well stated in Burroughs, Public Securities, thus (page 360): "The holder of municipal bonds who is protected from "defects in their issue is one who has no knowledge of the "defects, for, if he knows of these defects, he is placed upon "precisely the same footing as the original parties to the "transaction. Any defense that would be good between the "maker of the paper and the payee would be good as to a subsequent holder who has notice of the equities or defects set "up as a defense to the bonds.

"We have heretofore considered the question of how far "the recitals in the bonds themselves were notice to the purchaser of defects, and the doctrine then announced was "that they were not only notice of defects appearing on the "face of them, but when they put a party upon inquiry he "was deemed to have all information that, by reasonable "diligence in the prosecution of that inquiry, he could "obtain.

"Notice is not confined to recitals of the bonds. It is immaterial how the purchaser gets the information that there "are defects in the issue of the bonds; it is the fact that he "has knowledge of the defects that binds him and puts him "in the same position as the original payee of the bond, who "is bound to see that all the conditions of issue have been "fully complied with.

"In City of Lexington *vs.* Butler, 14 Wall., 282, the plea, "which was a good one, set out the facts, which showed that "the bonds had been improperly and fraudulently put in "circulation, and then averred that the plaintiff had notice "of these facts. This plea, if sustained by proof, would "have defeated the holder. * * * In Cass County *vs.* "Green, 66 Mo., 498, where holder was affected with notice

"of fraud in issue of bonds; negotiation enjoined and bonds "directed to be delivered up to be cancelled."

See—

Hopple *vs.* Hipple, 33 Ohio St., 116.
Harshman *vs.* Bates Co., 92 U. S., 569–575.
Bates *vs.* Winters, 97 U. S., 85–91.
McClure *vs.* Township Oxford, 94 U. S., 429.

In the last-named case the purchaser was presumed to know that the notice of thirty days before election had not been given. The recital informed him of the day of the election and directed him to the law under which the bonds were issued, which in express terms announced to him that it did not take effect until published in a particular newspaper; and being thus put upon inquiry, it was his duty to ascertain when the law was published and did go into effect, and he will be chargeable with such information as by reasonable diligence he could have ascertained. Chief Justice Waite remarked:

"To be a *bona fide* holder, one must be himself a purchaser "for value without notice, or the successor of one who was. "Every man is chargeable with notice of that which the law "requires him to know, and of that which, after being put "upon inquiry, he might have ascertained by the exercise "of reasonable diligence. Every dealer in municipal bonds, "which upon their face refer to the statute under which "they were issued, is bound to take notice of the statute and "of all its requirements."

McClure *vs.* Township Oxford, 94 U. S., 429.
Burroughs, Public Securities, p. 331.

V.

THE HOLDERS OF 101 ADDITIONAL BONDS HAD DUE NOTICE OF THE DEFECTIVE ISSUE BY REASON OF THE CIRCULARS ISSUED BY COFFIN & STANTON, WHICH CLEARLY SHOWED AN OVERISSUE, AND BY REASON OF THE OPINIONS OF ATTORNEYS AND OTHER SOURCES OF INFORMATION.

(Reference will be made to the typewritten testimony.)

In addition to the 150 refunding bonds bought by E. & G. Wallace with notice, there are at least 101 bonds where the purchasers did not rely upon the recitals of the bonds, but had evidence before them of the illegal issue. The International Trust Company of Boston holds 16 of the refunding bonds. These were held as collateral for a loan of $4,000. The $4,000 was first secured by Illinois Central bonds. The examination and approval of Coffin & Stanton's attorneys satisfied them (p. 6, stipulation). The Kenduskeng National Bank of Bangor, Maine, on May 31, 1894, loaned $10,000 to Coffin & Stanton on 12 refunding bonds. The cashier telegraphed to A. P. Swanton, of Santa Cruz, to know if the bonds were good (p. 46). The bank had received knowledge of the overissue by circular of Coffin & Stanton (p. 50). Martin's Bank, Limited, of London, holds 10 bonds. The bank had knowledge of the refunding to benefit a private corporation (*ibid.*, pp. 63–9). The South Norfolk Savings Bank of South Norfolk loaned Coffin & Stanton $10,000 on 11 bonds of Santa Cruz June 26, 1894. The officers of the bank saw the attorney's opinion, also the circular with the account of overissue (p. 371). Coffin told the officers that he absolutely bought the bonds (p. 38). The First National

Bank of Worcester, Massachusetts, on July 20, 1894, loaned $25,000 to Coffin & Stanton, partly on Illinois Central and Santa Cruz bonds; $22,000 was loaned on 22 of these bonds. Petitioner herein bought the bonds for 60 per cent. of their face value. The bank received notice of overissue by a circular, and also of the invalidity of the bonds through a Mr. Terrell. Petitioner bought other bonds at 40 per cent. of their face. Coffin & Stanton stated that they were the fiscal agents of Santa Cruz (p. 26). The First National Bank of Webster, Massachusetts, has 4 refunding bonds. It had notice of overissue by circular (*ibid.*, 55–60). The Bank of Skaneateles, New York, loaned Coffin & Stanton $10,000 on 7 bonds June 1, 1894; had notice of the overissue by the circular, and also wrote to a banker in Santa Cruz and received a pamphlet in reply (p. 42). The Chapman National Bank of Portland, Maine, May 8, 1894, loaned Coffin & Stanton $5,000 on the security of 7 Santa Cruz bonds. It believed that Coffin & Stanton were the absolute owners. It wrote to several parties in Santa Cruz about the bonds (p. 9); also saw the opinion of Coffin & Stanton's attorneys, loaned on the security of City of Ironwood, Michigan, bonds and American Debenture Company, Chicago, as well as Santa Cruz bonds. The City of Ironwood bonds were declared invalid. The Debenture Company of Chicago turned out valueless. The Wakefield Trust Company of Wakefield, Rhode Island, on August 2, 1894, loaned Coffin & Stanton money on one Santa Cruz bond. It arranged with the receiver of Coffin & Stanton to take the bond at 60 per cent. of its face value. It received circular with the account of the overissue (p. 12). The First National Bank of Hagerstown, Maryland, holds 6 of the bonds on note of Coffin & Stanton dated July 18, 1894. It received circular in reference to overissue (p. 28). It looked up the question of population (p. 30). The Albany City National Bank of Albany, New York, holds 11 bonds. It made a loan to Coffin & Stanton on July 25, 1894, on 11 Santa Cruz refunding bonds. The bonds were sold after the

failure of Coffin & Stanton and brought 60 cents on the dollar. It had knowledge of overissue by circular. Farmers' national bank, Mount Holly, New Jersey, on June 2, 1894, loaned Coffin & Stanton, on 4 bonds of Santa Cruz as collateral. Receiver Coffin & Stanton stated that court had authorized them to value bonds at 60. Had circular (p. 44). National Bank of Waterville, N. Y., May 3, 1894, loaned on 1 Santa Cruz bond. It made a thorough investigation of the bonds. It wrote Mayor Bowman, of Santa Cruz. Coffin & Stanton said they had bought the bonds. The bond was sold at public sale and bank bought same. Coffin & Stanton sent prospectus of bonds of Santa Cruz, viz: Circular. (See letter of Bowman, p. 55.)

Northern Counties Investment Trust (Limited) loaned Coffin & Stanton on 3 bonds. It had full knowledge of the fact that the refunding bonds were issued to take up the indebtedness of the Santa Cruz Water Company. This the plaintiff concedes and admits that as to those bonds the notice is clear. The claim of the assignee falls. What is true of these is, in truth, true of all.

Burden of Proof.

Burden of proof shifts when defendant has shown, as he has here, circumstances of fraud or illegality in the inception of the bonds or in the circumstances under which they were issued. Then plaintiff cannot recover without proof that he purchased them for value, or gave some consideration for them.

Stewart *vs.* Lansing, 104 U. S., 509.
Vosburg *vs.* Diefendorf, 119 N. Y., 357.
Smith *vs.* Livingston, 111 Mass., 342.
Jordon *vs.* Grover, 99 Cal., 194.

The defendant has clearly shown fraud and illegality in the issue of bonds, and that notice of the facts was acquirep

by the bondholders by the public records, ordinances, and statutes. Hence they are not *bona fide* purchasers and are not protected by recitals. The assignors of plaintiff have failed to reply to the evidence of defendant on these propositions.

Defendant has shown that the consideration is illegal, that the bonds were fraudulently delivered, and that the conditions precedent were not performed, and that the bonds were stolen before plaintiff's assignors received them.

Sect. 120, Simonton on Bonds.

In conclusion, we submit that this case is one of peculiar hardship for the citizens of Santa Cruz. The views of Mr. Justice Miller, in a similar matter, can be quoted here with effect:

"In *County Bond Cases*, * * * it is held that the "paper, though issued without authority of law, and in op- "position to its express provisions, is still valid.

"There is no reason in the nature of the condition on which "the power depends in these cases why any purchaser should "not take notice of its existence before he buys. The bonds "in this case were issued at one time, as one act, of one "date, and in payment of one subscription. All this "was a matter of record in the town where it was done.

"So, also, the valuation of all the property of the town for "the taxation of the year before the bonds were issued is of "record both in that town and in the office of the clerk of "the county in which the town is located. A purchaser had "but to write to the township clerk or the county clerk to "know precisely the amount of the issue of bonds and the "value of the taxable property within the township. In the "matter of a power depending on these facts, in any other "class of cases, it would be held that before buying these "bonds the purchaser must look to those matters on which "their validity depended. They are all public, all open, all

"accessible—the statutes, the ordinance for their issue, the "latest assessment-roll. But in favor of a purchaser of mu- "nicipal bonds all this is to be disregarded, and a debt con- "tracted without authority, and in violation of express stat- "ute, is to be collected out of the property of the helpless "man who owns any in that district. I say helpless ad- "visedly, because these are not his agents. They are the "officers of the law, appointed or elected without his consent, "acting contrary, perhaps, to his wishes. Surely if the acts "of any class of officers should be valid only when done in "conformity to law, it is those who manage the affairs of "towns, counties, and villages in creating debts which not "they, but the property-owners, must pay. * * *

"It is easy to say, and looks plausible when said, that if "municipal corporations put bonds on the market they "must pay them when they become due. But it is another "thing to say that when an officer, created by the law, ex- "ceeds the authority conferred upon him, and in open "violation of law issues these bonds, the owner of property "lying within the corporation must pay them, though he "had no part whatever in their issue and no power to pre- "vent it.

"This latter is the true view of the matter. As the "corporation could only exercise such power as the law con- "ferred, the issuing of the bonds was not the act of the cor- "poration. It is a false assumption to say that the corpora- "tion put them on the market. If one of two innocent "persons must suffer for the unauthorized act of the town- "ship or county officers, it is clear that he who could, before "parting with his money, have easily ascertained that they "were unauthorized, should lose, rather than the property- "holder, who might not know anything of the matter, or, "if he did, had no power to prevent the wrong" (Humboldt Township *vs.* Long *et al.*, 92 U. S., 649).

FRANK J. SULLIVAN,
Amicus Curiæ.

No. 39.
Petition for Rehearing.
Rec'd & Dist'd Mar. 31, 1902
OFFICE SUPREME COURT U.S.
RECEIVED
MAR 31 1902

Supreme Court of the United States.

OCTOBER TERM, 1901.

NO. 39.

ALBERT H. WAITE

vs.

THE CITY OF SANTA CRUZ.

PETITION FOR REHEARING FILED ON BEHALF OF CITY OF SANTA CRUZ.

FREDERIC R. COUDERT, Jr.,
PAUL FULLER,
Counsel.

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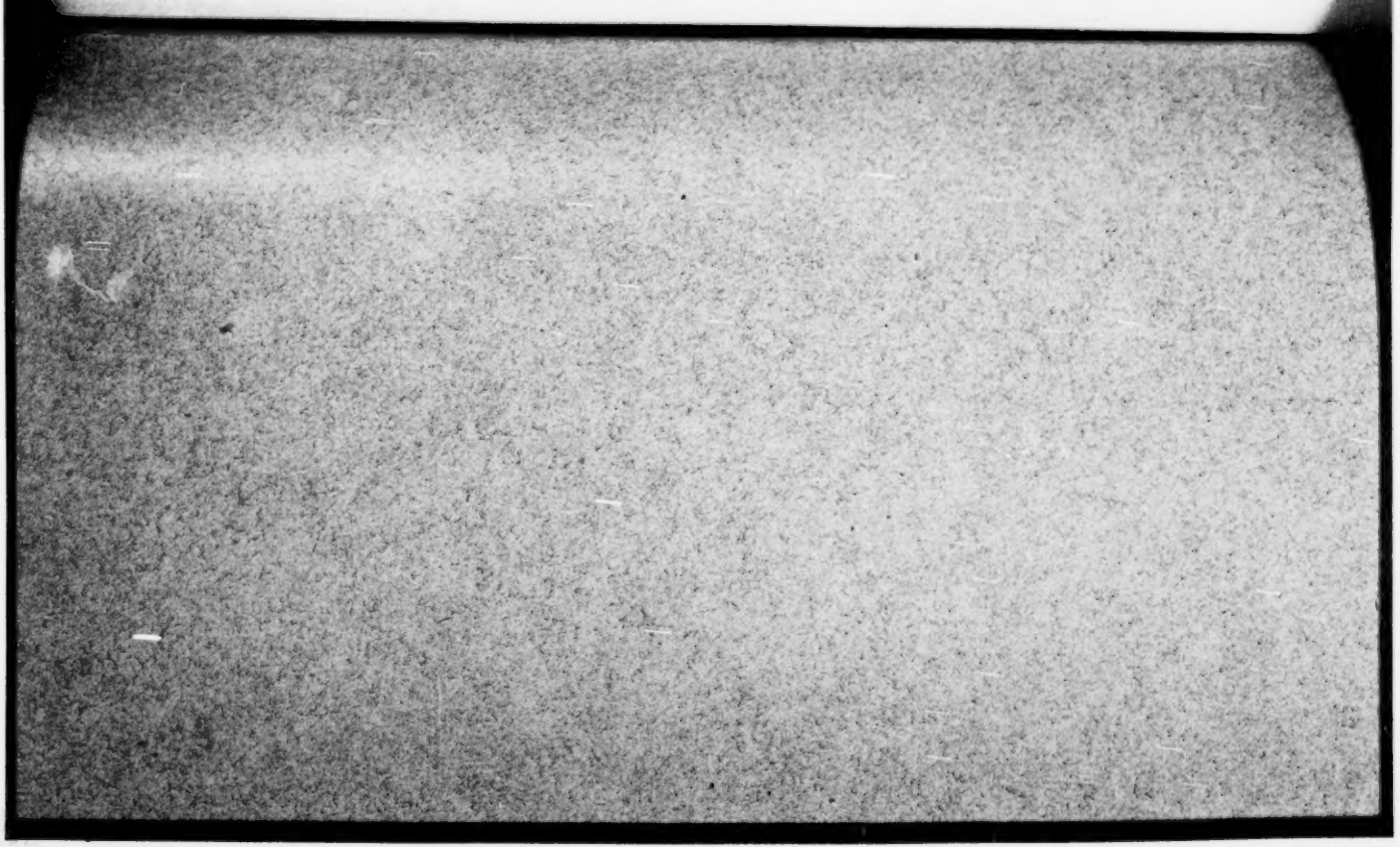

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 39.

ALBERT H. WAITE,

v.

THE CITY OF SANTA CRUZ.

Petition for rehearing filed on behalf of the City of Santa Cruz.

The City of Santa Cruz respondent in the above cause respectfully presents its petition to the Honorable Court for a rehearing of this case (the mandate herein not having issued) and sets forth the reasons urged in behalf of its application.

I.

Preliminary.

In filing this petition counsel are fully conscious of the reluctance of this Court to grant rehearings in cases heard and already determined. They are impressed by and entirely appreciate the careful consideration given to the case and

the length of time during which it was under consideration.

Nor are counsel unmindful of the fact that the practice of rehearing causes does not commend itself to this Court ; as was said by the eminent Chief Justice TANEY many years ago,

> " If this Court should accept a practice analogous to that of the English Chancery, we should soon find ourselves in the same predicament and we should be hearing over again at a second term almost all the cases which we had heard and adjudged at a former one, and upon which our own opinions would have been definitely made up upon the first argument."
>
> Brown *et al. v.* Aspaden *et al.*
> 14 Howard, 24.

Yet even with these considerations before them, counsel believe that the peculiar circumstances of this case, the condition of American jurisprudence regarding the questions involved, and especially the rulings of this Court upon the vastly important questions arising out of the issue of municipal securities would justify a rehearing and that such reargument and reconsideration might tend to harmonize decisions of this Court as well as accord to petitioner the protection of his just claims.

Well aware of the familiarity of the Court with the facts in this cause, counsel will state in the fewest possible words petitioner's contentions, avoiding all elaborate argument and numerous citations.

II.

Grounds of and Reasons for Rehearing.

The three grounds upon which the petitioner relies are :

A.—THE DECISIVE QUESTION IN THE CASE HAS BEEN OVERLOOKED OR MISAPPREHENDED.

B.—THE DECISION PRACTICALLY INVOLVES THE OVERRULING OF ANOTHER CASE UNANIMOUSLY DECIDED BY THIS COURT AND FROM WHICH THE PRESENT CASE HAS NOT BEEN DISTINGUISHED.

C.—THE QUESTION OF THE *bona fides* OF WALLACE AND COMPANY INVOLVING THE VALIDITY OF THE GREATER PART OF THE CLAIM SUED UPON WAS NOT SPECIFICALLY CONSIDERED, AS FAR AS PETITIONER CAN JUDGE FROM THE OPINION, ALTHOUGH THE INCIDENTAL DECISION OF THAT POINT INVOLVES THE ADOPTION OF A RULE OF FAR-REACHING CONSEQUENCE AT VARIANCE WITH DECISIONS OF IMPORTANCE IN STATE COURTS.

The reasons, concisely stated, in support of these grounds, are as follows :

A., B.

The theory upon which the opinion of the Court proceeds is that enunciated in and sanctioned by the case of Chaffee County *v.* Potter, 142 U. S., 355, subsequently reiterated and affirmed in Gunnison County Comm'rs *v.* Rollins, 173 U. S., 255.

The doctrine there laid down, which is now indisputably the law in courts of the United States and which we have no disposition to doubt or question, is this : where a statute grants to a municipal corporation—including in that term both its officers and all its citizens or electors—the power to issue bonds, and prescribes certain acts to be done by the city either prior to or concomitant with the issue of such bonds, the city may by reciting in the bonds that all the said acts have been duly performed in accordance with the law, estop itself from alleging, as a matter of defense, that any of said acts were omitted or irregularly or improperly performed. None of the cases have stated the doctrine, we respectfully submit, more broadly than this.

Did the case at bar fall within the purview of this rule or involve the application of this principle we could only acquiesce in the necessity for deciding the case in favor of the *bona fide* holders of the bonds—no other result would, upon the authorities, be possible.

The doctrine, however, which we invoke and which is applicable to, and in the view of counsel, decisive of the case at bar is equally supported by authority and in no wise in conflict with Chaffee County *v.* Potter and Gunnison Co. Comm'rs. *v.* Rollins. That doctrine is, that in case the enabling statute directs the recording of facts, the existence of which is necessarily antecedent to and a condition of the issuance of the bonds, the purchaser must refer thereto or take the bonds at his peril. That this is a fair statement of the

rule, appears from the following short citations :

> " If the fact necessary to the existence of the authority was by law to be ascertained, not officially by the officers to be charged with the execution of the power, but by reference to some express and definite record of a public character, then the true meaning of the law would be that the authority to act at all would depend upon the actual objective existence of the requisite fact,* as shown by the record, and not upon its ascertainment and determination by any one; and the consequence would necessarily follow that all persons claiming under the exercise of such a power might be put to the proof of the fact made a condition of its lawfulness, notwithstanding any recitals in the instrument."
>
> Dixon *v.* Field, 111 U. S., 93,

or as lucidly and tersely expressed by the learned Mr. Justice Gray.

> " But if the statute expressly requires those facts to be made a matter of public record, open to the inspection of every one there can be no implication that it was intended to leave that matter to be determined and concluded contrary to the facts so recorded, by the officers charged with the duty of issuing the bonds."
>
> Sutliff *v.* Lake County Commissioner, 147 U. S., 235.

In the California statute it will be noticed that the words " whenever any city has an outstanding indebtedness evidenced by bonds and warrants thereof," etc. are equivalent to the expression

* In the case at bar, the existence of an indebtedness of the city evidenced by its bonds.

"*any* city having an indebtedness evidenced," etc. This makes the meaning obvious. It is as though the Statute provided that "any city having a population of more than one thousand inhabitants may refund," etc.

The sole question then is as to what is to determine the existence of the state of facts which the statute requires.

The indebedness must be evidenced by bonds and warrants of the city, but how is the existence of such bonds and warrants to be determined?

If this is a question to be determined solely by the town officers, then their recital must bind the city, under the doctrine of Chaffee County *v.* Potter.

If on the other hand the statute provides that the jurisdictional fact be embodied in any writing or record the purchaser must refer thereto or take the bonds at his peril.

Sutliff *v.* Lake Co. Comm'rs,
147 U. S., 235.

Apply this criterion to the case at bar.

The enabling act under which the city issued the bonds provides :

"§1. That whenever any incorporated city or town other than cities of the first class in this State has an outstanding indebtedness *evidenced by bonds and warrants thereof* the common council, etc., shall have power to submit to the qualified voters, etc., the question *of refunding such indebtedness.* * *

Said election shall be called and held in the same manner as other elections are held in such city or towns. *The notice of such election shall re-*

*cite the indebtedness to be refunded together with * * * all other details of the bonds proposed to be issued.*"

Did the statute make no provision for the election notice and its contents the rule in Chaffee County *v.* Potter would apply.

If, on the other hand, the Legislature out of abundant caution has provided in the statute for any record or documentary attestation of the jurisdictional fact upon which the power of the city depends, then the doctrine of Sutliff *v.* Lake Co. Commissoners applies and the purchaser must look beyond the recitals in the bonds to the record itself.

In the latter case the County Commissioners, *the same persons who were to issue the bonds*, were to prepare certain statements.

The statute of Colorado enacts :

> "It shall be the duty of the board of county commissioners of each county to make out semi-annual statements at the regular sessions in January and July, at which time they shall have such statements published, etc., and such statement shall show the amount of debt owing by their county, in what the debt consists," etc., 147 U. S., 232.

The election notice in the case at bar was to contain a statement of the indebtedness to be refunded.

There is only one possible distinction (not suggested in the opinion of the honorable Court) between these two statutes. The Colorado statute provides that

> " the statements of indebtedness must be published in a newspaper, and shall also

> be entered of record by *the clerk of the board* of county commissioners in a book to be by him kept for that purpose only, which book shall be open to the inspection of the public at all times."

It must, therefore, be conceded (if the Sutliff case stands) that had the California statute provided that the City Clerk should enter the notice of election in a book open to public inspection, the Court would have decided this case differently.

The two statutes would then have been *absolutely* analogous. The sole point therefor upon which the decision herein can logically be sustained is upon the omission in the California statute of the word record. Had the statute added to the words "the notice of such election" the further words, to be *entered of record by the town clerk*, this case must have been decided in favor of the city.

Is this omission material and is not the suggested distinction wholly untenable?

The notice must contain certain information and must be issued by the city authorities. It must evidently be in writing and in so far is similar to the requirements for the debt statements of the Colorado statute. A municipal corporation is a public governmental body. Its legal acts are and must be of record, and the Court will take judicial notice of this. No one would be allowed to plead that he was ignorant of the fact that municipal corporations keep records.

> "A record in its broad and general sense is a memorial of what has been done; authentic written evidence consid-

ered as either public or private, but usually public. It is a written account of some act, transaction or instrument drawn up, under authority of law, by a proper officer, and designed to remain as a proper memorial or permanent evidence of the matters to which it relates."

Am. and Eng. Encyc. of Law, Art. , Record .

A municipal body can only act through its officers in their corporate capacity. They must act as a unit---*and the act of such a body in issuing a written notice required by statute is sufficient to constitute a record.* Even a pencil writing made by a town council has been considered a record.

Franklin *v.* Tiernan, 62 Texas, 92.

Hence nothing would have been added to the force of the statute by the addition of the words used in the Colorado law. They would have been mere surplusage.

In addition to these general considerations there are additional ones peculiar to this case which would seem conclusive.

The statutes of California prescribe that the resolutions and ordinances (*i. e.*, the official acts of the city) shall be kept "in large, well bound and uniform and suitable books."

As was aptly said by the Supreme Court of Ohio:

> "The members comprising the Board have no power to act as a board except where together in session. They then act

> as a body or unit. The statute requires the clerk to record, in a book to be furnished for that purpose, all their official proceedings."
>
> McCartle *v.* Bates, 29 Ohio St., 419.

It is, however, quite idle to contend that the notice of election is not of itself a record. Whether it is embodied in an ordinance or resolution which itself constitutes a record is immaterial.

This particular statute provides minutely for the making of a particular notice by the city officials. That meets the requirements laid down by this honorable Court.

If the city officials had not made the notice the case would be the same as though the Commissioners should have failed to make the semi-annual statement called for by the Colorado statute, and other and different questions might then arise. Here it is admitted that the notice was made and was of record. *Jam satis.*

The Honorable Court in the opinion in this case says :

> "As there was power in the city to issue refunding bonds to be used in discharging its outstanding indebtedness of a specified kind, purchasers were entitled to rely upon the truth of the recitals in the bonds that they were of the class which the act of 1893 authorized to be refunded. *They were under no duty to go further and examine the ordinances of the city to ascertain whether the recitals were false.*"
>
> Opinion of Mr. Justice Harlan, p. 14.

To this proposition we give entire assent. The purchasers were under no obligation to examine the ordinances of the city *qua* ordinances.

Ordinances need not be examined for the purpose of verifying the recitals made in bonds as to matters within the jurisdiction of the officers issuing them. Why? Because the Statute does not require such an ordinance as a prerequisite to the issue of such bonds.

But in this case the purchaser *was* required to examine, not an ordinance, but the *notice of election.* Why? Because the Statute made such notice and the specific facts to be embodied in such notice, a prerequisite to the authority to issue the bonds.

The fact that such notice of election was included in an ordinance was a mere incident. The notice should have been looked to, wherever it might be recorded.

The expression above quoted from the opinion has lead your petitioner to assume that the proposition upon which he conceives his rights to rest was not present to the minds of the learned Court.

Unless, therefore, the decision in this case is intended to annul the decision in Sutliff *v.* Board of County Commissioners and similar cases, your petitioner most respectfully urges that he should have an opportunity to be reheard.

III.

C.

The second ground upon which the petitioner relies is that the effect of the decision herein if adhered to would be to overturn certain well settled principles of law, overruling Federal and State decisions.

The opinion makes it evident that such result was not intended.

If it was intended to establish new rules of law it is fair to presume that the Court would have stated them explicitly, rather than have left them to be inferred from the judgment.

The decision that Wallace and Company were *bona fide* holders cannot be maintained upon any principles of law heretofore judicially established. The inference that the decision can be supported only by a modification of acknowledged principles is unavoidable.

Our position is that:

I.—Prince and Company were the agents of Wallace and Company and had knowledge of the invalidity of the bonds (Finding of Fact Record, p. 24).

II.—That the law will impute such knowledge to Wallace and Company.

The only expression in the opinion of the Court which seems to have any bearing on the *bona fides* of Wallace and Company is the following:

> "The Circuit Court having found—and, as we think, correctly—that the assignors of the plaintiff were *bona fide* purchasers, without notice of anything affecting the truth of the recitals in them, our conclusion is that the city cannot escape liability by reason of the fact disclosed by its ordinances, that the 89 first mortgage bonds of the Water Company assumed by the city were included in its refunding scheme" (Opinion, p. 14).

The finding of fact as to the relations between Wallace and Company and Prince and Company we willingly abide by and rely upon, *but* the legal conclusion deduced therefrom by the Circuit Court is so revolutionary of elemental legal principles that we seriously doubt the intention of this honorable Court to sanction it. Certainly, it has not done so explicitly.

The finding of fact referred to is as follows:

> "and in relation to E. G. and E. Wallace from whom the plaintiff derives the legal title to the remaining bonds and coupons sued on, the Court finds that on or about September 22, 1894, E. G. and E. Wallace, assignors of plaintiff, purchased from Coffin and Stanton 150 of the said bonds and coupons referred to in the preceding finding, including eight of the bonds and coupons sued on in this action, giving in exchange therefor 435 shares of the stock of the Page Belting Company and $115,000 in cash. Said purchase and exchange was made by the firm of F. H. Prince and Company *acting as agents of E. G. & E. Wallace*, and also acting for Coffin and Stanton *in the same transaction*. The firm of F. H. Prince and Company received of E. G. and

E. Wallace, as their agents in effecting the sale of the Page Belting stock, the sum of two thousand five hundred dollars, and said Coffin and Stanton agreed to compensate said F. H. Prince and Company for their services rendered to them in the same transaction by a division of all the profits which should be realized by said Coffin and Stanton upon a re-sale of the said shares of stock of the Page Belting Company. At the time of the said sale of the refunding bonds by the defendant city to E. G. and E. Wallace and Company the said firm of F. H. Prince and Company had notice of all matters related in the ordinances of defendant numbered 314, 315 and 320, hereinbefore referred to in the preceding findings. The said F. H. Prince and Company did not communicate their said knowledge to E. G. and E. Wallace and Company, and the said E. G. & E. Wallace had no actual knowledge or actual notice of any of said matters, nor actual notice of any fact tending to impeach the truth of the recitals contained in said bonds—and unless the notice to F. H. Prince and Company is to be imputed as notice to them, the said E. G. and E. Wallace had no constructive notice of the facts recited in said ordinances, or any facts tending to impeach the truth of the recitals contained in said bonds" (Record, p. 24).

From which the Circuit Court curiously enough deduced this conclusion:

"That E. G. and E. Wallace were *bona fide* purchasers of the bonds and coupons assigned by them to plaintiff, without notice of the facts recited in the ordinances of the defendant numbered 314, 315 and 320, and

without notice of any fact tending to impeach the truth of the recitals contained in said bonds" (Record, p. 25).

It has been suggested that the knowledge of Prince and Company was obtained in another transaction, but this is a wholly untenable suggestion. The finding itself explicitly twice speaks of the matter as the "*same transaction.*"

Wallace and Company purchased the bonds in question, paying therefor in stock and cash. That the transaction was partly a sale and partly an exchange is immaterial. The legal elements of both are the same, and the attempt by some metaphysical writers to differentiate the two by treating a sale as one transaction and an exchange as two is unsound and unsupported. It can have no bearing here.

> "*Sale or exchange* is a transmutation of property from one man to another in consideration of some price or recompense in value * * * If it be a commutation of goods for goods it is more properly an exchange; but if it be a transferring of goods for money it is called a sale. * * * But with regard to the law of sales and exchanges there is no difference. I shall, therefore, treat of them both under the denomination of sales only." (Blackstone, Ch. 30, 447.)

The French Civil Code provides;

> "§ 1702, An exchange is a contract by which the parties give respectively to each other one thing for another;"
>
> "§ 1707. All the other rules set down for contracts of sale shall moreover apply to exchanges." (Cachard, Code Civil.)

The transaction, whether sale or exchange, was

one whole, complete, indivisible transaction. The transfer of the Belting stock and cash from Wallace to Coffin and Stanton and the transfer of the Santa Cruz bonds from them to Wallace and Company were interdependent and synchronous constituting one legal act.

This being clear we will apply to this transaction the settled rules of agency with a view of determining the effect which the knowledge of Prince and Company obtained in this single transaction had upon Wallace and Company.

In stating these rules we will for the sake of brevity avoid the citation of authorities and endeavor to state the law so that even the eminent counsel for the plaintiff cannot question its correctness—at least apart from the decision of the Circuit Court in this very case.

The rules of law on this point are:

I.—*Qui facit per alium facit per se;* hence as a matter of justice and public policy a principal cannot plead ignorance of facts within the knowledge of his agent and thus gain benefits to which he would not be entitled had he himself possessed such knowledge. Without this rule, one acting through an agent would have an undue advantage over those acting directly and the agent acting *mala fide* could reap the fruits of a transaction for his principal which in equity and conscience he could not reap for himself.

In other words, no one is licensed to commit vicarious fraud. This settled rule is no mere presumption of law or fact that the agent will communicate his knowledge to the principal. If that were so the principal would be at liberty to show that actually, and in fact he was without

such knowledge; that such defence cannot be pleaded is conclusively demonstrative that the rule is no mere presumption but a positive rule of law.

II.—If the apparent agent acts fraudulently, in violation of his fiduciary relation, the rule cannot apply because the fraud ruptures the relation, and it can no longer be said that the apparent principal is acting through another; the acts of the agent cease to be his acts; *qui facit per alium facit per se* ceases to apply. Besides if the transactions were fraudulent other principles of law are applicable to protect the principal and third parties who may have suffered.

III.—The knowledge must be present to the mind of the agent, that is, the agent himself, must actually have the information, otherwise it would not be just to charge his principal therewith; not so much because of any presumption that the agent will communicate the knowledge but because, if not present to his mind the transaction cannot have been affected by it. His act was *bona fide*, and, therefore, no moral (and consequent legal) ground exists for imputing to the principal any *mala fides*. He gains no undue advantage.

If the knowledge of the agent was acquired in the course of the transaction for which he was employed, the knowledge must, in the nature of things, have been in his mind, and hence is imputable to his principal. But if the knowledge was acquired at another time, in another transaction, the law makes no presump-

tion on the subject, and it becomes a question of actual proof. If the testimony demonstrates that the knowledge was in the agent's mind the rule then applies.

These rules are simple, and entirely rational, based on common knowledge and sound philosophy. They present in themselves no difficulties, and the only questions that can arise are as to their applicability to a particular state of facts. As showing how far eminent Courts have gone in imputing to a principal the knowledge gained by an agent in another transaction for another principal, a recent case in the Court of Appeals of the State of New York (not, we be lieve, cited in argument or briefs in this case), may be of interest.

The case of McCutcheon *v.* Ditmann, 164 N. Y., 355, presented the following situation :

Calman, as attorney for Isaacs, an attaching creditor of Ditmann, learned that McCutcheon owned an equity in stock in possession of Ditmann. Later, Calman became attorney for Ditmann, and had charge of the sale of the same stock. The sale was found to be irregular and wrongful. Isaacs bought the stock ; the *bona fides* of his purchase was disputed.

The Court said (p. 357) :

> " It is undoubtedly the settled rule that a principal is only chargeable with notice communicated to or knowledge acquired by his agent in another transaction and when he was acting for another principal, when clear proof is made that the knowledge or notice was present in the mind of the agent

at the time of the transaction in question (Constant *et al*, Executors *et al*, *v.* University of Rochester, 111 N. Y., 604, 611.) S. Isaacs and Company are not only brought within the rule stated, *but the facts show essentially one transaction* in the interest of S. Isaacs, which renders the rule inapplicable.

* * * * *

" It is evident that the precise knowledge of this situation was in the mind of the attorney at the time of the sale, within the rules referred to above, so that it is of no importance whether he was acting for Ditmann or S. Isaacs & Company. It is equally apparent that these facts show one transaction in regard to the stock."

The Circuit Court attempted in the case at bar to avoid the imputation of knowledge to Wallace by the following reasoning :

" To the general rule, etc., there is an exception which is well settled.

The exception is that when in the transaction of business the agent really acts for his own benefit or for the benefit and advantage of the other party to the transaction, notice to him is not deemed constructive notice to the principal."

Record, p. 52.

If this means that where the agent has so acted as to rupture the fiduciary relation the rule cannot apply we do not dissent from the proposition (*vide supra*).

But here there was no fraud ; no act which could have justified a repudiation of Prince's

agency or a severance of the relation on the part of Wallace and Company. Nor did they make any such claim. Prince and Company concealed nothing from Wallace.

The eminent counsel for the plaintiff says "that in the sale of these bonds, F. H. Prince and Company were 'openly and avowedly' acting as agents for Coffin and Stanton and not as agents of E. G. & E. Wallace."

Brief for petitioner, p, 266.

But Prince sold the belting stock for Wallace, taking the Santa Cruz bonds in payment and received the sum of $2,500 for his services. Wallace evidently found no fault with his agent. Had Wallace dealt directly with Coffin and Stanton he would have seen the ordinances and would admittedly not have been a *bona fide* purchaser.

The mediation of Prince enabled Wallace to dispose of his Belting Company stock without seeing the ordinances and thus plead blissful ignorance. But, says the Circuit Court, "said purchase and exchange *was made by the firm of F. H. Prince and Company, acting as agents of E. G. and E. Wallace and Company*, and also acting for Coffin and Stanton in the *same transaction*." Yet the latter relation was admittedly "open and avowed," hence not fraudulent, and thus there is no fact in the case to contradict or minimize the statement of the finding that Prince were "acting as agents of" Wallace in this one transaction.

We therefore insist, and claim without fear of

contradiction, that in ultimate analysis the single circumstance upon which the Circuit Court and plaintiff rely in order to make of the *mala fides* of Prince, the *bona fides* of Wallace is "the open and avowed" fact that Prince received a commission from Coffin and Stanton.

We have, therefore, this new and anomalous rule grafted on the law that where an agent acting without fraud "openly and avowedly" accepts a commission of the vendee the principal ceases to be chargeable with his knowledge gained in the "same transaction" for which he was employed. He has only to keep his eyes tightly shut and reap the benefit of any transaction which his more enlightened agent may enter into. In other words, pure water may be derived from a tainted source.

This doctrine we respectfully submit never has found and never can find favor with the honorable Court. That the decision herein apparently sanctions it, although we do not believe such to have been the intention, seems to us good ground for reargument.

In addition to the foregoing consideration, we call attention to the finding of the Circuit Court, not mentioned in the opinion of this Court, that Dickinson, the attorney retained by Prince and Company, solely at the suggestion of Wallace and Company, was not the agent or attorney of Wallace. Such finding seems so manifestly at variance with all the evidence on the point that we beg respectfully to call the attention of this honorable Court specifically thereto.

Finally, the multiplicity of detail and the very numerous and intricate questions rendering the case quite exceptional, prevented counsel from presenting within the time allotted for oral argument the matters involved in a manner compatible with the interest of your petitioner, the city and people of Santa Cruz.

WHEREFORE, your petitioner prays this Honorable Court that an opportunity be afforded to reargue this cause, and that pending such reargument and the determination thereof, the issue of the mandate herein be stayed.

And the undersigned members of the Bar of this Honorable Court humbly conceive it proper that the appeal therein should be reheard by the Court, if this Court, shall see fit so to order.

All of which is most respectfully submitted.

THE CITY OF SANTA CRUZ,
Petitioner.

New York, 25 March, 1902.

FREDERIC R. COUDERT, Jr.,
PAUL FULLER,
Counsel.

Supreme Court of the United States.

No. 39.—October Term, 1901.

Albert H. Waite, Petitioner, vs. The City of Santa Cruz. } On writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[February 24th 1902.]

Mr. Justice Harlan delivered the opinion of the Court.

This action was brought in the name of Waite, a citizen of Massachusetts, against the city of Santa Cruz, a municipal corporation of California of the fifth class, to recover the principal and interest of certain negotiable bonds, nine in number, and certain negotiable coupons thereof, two hundred and eighty-two in number, issued April 16th 1894, in the name of the defendant city.

Each bond, signed by "Wm. T. Jeter, Mayor of the city of Santa Cruz," and attested by "O. J. Lincoln, City Clerk," contained these recitals:

"And for the payment of the principal sum [$1,000] herein named, and the interest accruing thereon, the said city of Santa Cruz is held and firmly bound, and its faith and credit and all the real and personal property of said city are hereby pledged for the prompt payment of this bond and interest at maturity.

"This bond is one of a series of bonds of like date, tenor and effect, issued by the said city of Santa Cruz for the purpose of refunding the bonded indebtedness of said city and issuing bonds therefor, and providing for the payment of the same under and in pursuance of and in conformity with the provisions of an act of the legislature of the State of California, entitled 'An act to amend an act entitled "An act authorizing the common council, board of trustees, or other governing body of any incorporated city and town, other than cities of the first class, to refund its indebtedness, issue bonds therefor, and provide for the payment of the same" (approved March 15, 1883),' approved March 1, 1893.

"And in pursuance of and in conformity with the Constitution of the State of California, and the ordinances of the city of Santa Cruz, and in pursuance of and in conformity with a vote of more than two-thirds of all the qualified electors of said city of Santa Cruz, voting at a special election duly and legally called and held and conducted in said city as provided under said act, on Tuesday, the thirteenth day of March, 1894, notice thereof having been duly and legally given and published in the manner

as required by law, and after the result of said election had been canvassed, found and declared in the manner and as required by law.

"And it is hereby certified and declared that all acts, conditions and things required by law to be done precedent to and in the issue of said bonds, have been properly done, happened and performed, in legal and due form, as required by law. This bond ceases to bear interest when due, unless presented for payment."

The parties having by written stipulation waived a jury, the case was determined in the Circuit Court upon a special finding of facts. The result was a judgment against the city for the full amount of the bonds and coupons held by the plaintiff, except as to three coupons transferred to him by the Northern Counties Investment Trust Company. 89 *Fed. Rep.* 619. That judgment was reversed in the Circuit Court of Appeals with directions to enter judgment for the city. 98 *Fed. Rep.* 387. The case is here upon writ of certiorari granted upon the application of the plaintiff Waite.

The propositions advanced on behalf of the city are numerous, but most of them are involved in the general contention that there was a want of power in the city to issue the bonds in question, and that nothing occurred that could estop it from disputing its liability even to those who may have purchased them in good faith and for value.

The circumstances under which the bonds were executed should be first set forth. That being done, we will take up such of the questions raised by the assignments of error as are necessary to be determined.

On the 16th day of September 1889 the City of Santa Cruz entered into a contract with certain persons doing business under the name of Coffin & Stanton, which recited that the former desired to acquire, and the latter desired to furnish, a waterworks system for the city—the city agreeing to grant to Coffin & Stanton a franchise for the construction of waterworks in Santa Cruz and that firm agreeing to construct or cause to be constructed a waterworks system in conformity with specifications theretofore made by the city engineer. The city agreed to purchase the waterworks after they were constructed and pay for them the sum of $320,000. It was also stipulated that Coffin & Stanton should cause to be organized a corporation to be known as the City Water Company of Santa Cruz, to which the above franchise should be assigned. It was further provided that the Water Company should execute a first mortgage upon all its properties, rights, titles and franchises, then owned or thereafter acquired, for the payment of bonds (not exceeding $400,000 in amount, except as provided in the contract) to be issued to Coffin & Stanton as the work of construction progressed, they to make all necessary cash advances. The contract provided: "And when said Water Company shall have fully completed said waterworks, then said Water Company shall convey absolutely to said city of Santa Cruz all its property, rights, titles and

franchises, to have and to hold forever, subject only to the mortgage and to the deed of trust or escrow hereinbefore mentioned. . . And said Water Company shall commence operations on the construction of said waterworks as soon as practicable, and shall have the whole completed within one year of such commencement."

Pursuant to the above agreement the city, by ordinance, granted to Coffin & Stanton a franchise and right of way to construct the waterworks, and such franchise and rights were assigned by them to the City Water Company, incorporated September 27th 1889.

Under date of May 1st 1890 the Water Company, pursuant to that agreement, executed a mortgage or deed of trust to secure the payment of four hundred bonds of $1,000 each. That was done in order to obtain money for the construction of the proposed waterworks.

Subsequently, March 29th 1892, the Water Company executed a deed to the city, which recited that the waterworks has been fully completed to the satisfaction of the city and had been accepted by it. By that deed the Water Company conveyed its entire property, rights, power, privileges and franchises to the city, to have and to hold the same, "subject, however, to said mortgage or deed of trust, and all the obligations thereby imposed, which bonds, mortgage or deed of trust, and obligations, the party of the second part [the city] *agrees to pay and perform.*"

When the act of March 1st 1893 referred to in the bonds was passed, as well as at the time the bonds were issued, the Constitution of California provided that "no county, city, town, township, board of education or school district shall incur any indebtedness or liability in any manner, or for any purpose, exceeding in any year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless, before or at the time of incurring such indebtedness, provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof on or before maturity, which shall not exceed forty years from the time of contracting the same. Any indebtedness or liability incurred contrary to this provision shall be void." § 18.

The ordinance referred to in the bonds—the one of the 26th day of February 1894 (No. 314) calling a special election of the qualified electors of the city to determine the question of refunding "the bonded indebtedness of said city and issuing bonds therefor, and providing for the payment of the same"—stated that "the outstanding indebtedness evidenced by bonds of said city," which "it is proposed to refund," consisted of (1) 450 bonds, of $500 each, issued in 1889, the proceeds of which had been used "in the purchase and construction of the city waterworks;" (2) 89

first mortgage bonds of the Water Company, of date May 1st 1890, "which said bonds outstanding were, at the time of the conveyance by the City Water Company to the city of Santa Cruz of the property known as the city waterworks, and now are, a valid lien and charge upon the property known as the city waterworks, and become thereby a part of the bonded indebtedness of the city;" and (3) 65 municipal improvement bonds of $500 each, dated September 23d 1887, and 26 municipal improvement bonds of $250 each, of like date.

The ordinance provided for an issue of 360 bonds of $1,000 each, payable to bearer, and carrying four per cent interest, payable annually, and which should be of the character known as "serials."

The same ordinance provided for a special election on the question of refunding the above bonds, and prescribed the form of the refunding bonds. That form contained the same recitals, word for word, that appear in the extract from the bonds found at the beginning of this opinion. The ordinance thus concluded: "§ 12. If, upon the canvass of the returns of said election, it shall be found that two-thirds of the voters thereat have voted in favor of refunding said indebtedness, issuing bonds therefor and providing for the payment of the same, then and thereafter said indebtedness shall be refunded, bonds issued therefor and provision made for the payment of the same in the manner herein and as by law provided."

On the same day the city council passed an ordinance, No. 315, which provided for notice of the special election so ordered, such notice to describe fully the indebtedness to be refunded. The required notice was given and contained the same description of the city indebtedness proposed to be refunded as was given in ordinance No. 314. The election was held on the day fixed by the ordinance and notice. The result was that 538 votes were cast in favor of and 57 votes against the proposed refunding of the city's indebtedness. So that more than two-thirds of the qualified electors voting were in favor of refunding the then "bonded indebtedness of the said city," including the above 89 first mortgage bonds issued by the Water Company and which the city had assumed to pay when it purchased and took the deed for the waterworks.

On the 26th day of March 1894 the city passed ordinance No. 320, which provided for refunding the indebtedness and issuing bonds therefor in accordance with the will of the voters at the special election.

That ordinance provided that each bond should contain the same recitals as those set forth in ordinance No. 314 and in the above notice of the special election, as well as this further recital: "And it is hereby certified and declared that all acts, conditions and things required by law to be done precedent to and in the issue of said bonds, have been properly done, happened and performed in legal and due form and as required by law."

By the same ordinance provision was made for giving notice by publication of the purpose of the mayor and common council to sell the bonds to the highest bidder, and inviting sealed bids from purchasers, and for levying and collecting an annual tax for forty years to pay such bonds and coupons—the moneys so collected to constitute a sinking fund for the payment of the principal.

In the finding of facts it was also stated that on April 11th 1892 William T. Jeter was duly elected mayor of Santa Cruz, and J. Howard Bailey, J. F. Hoffman, E. G. Green and F. W. Lucas, on the same day, members of the common council of the city. The persons so elected as mayor and members of the common council qualified for their respective offices within ten days after election, and entered upon the duties of their respective offices. Section three of the act of the legislature of California, entitled "An act to reincorporate the city of Santa Cruz," approved March 11th 1876, provides that the mayor and common council of said city shall hold their offices for a term of two years, and until their successors are duly elected and qualified. On the ninth day of April 1894 Robert Effey was duly elected mayor of defendant city to succeed William T. Jeter, and duly qualified as such between eleven o'clock A. M. and two o'clock P. M. of April 16th 1894; and Henry G. Ensell, John Howard Bailey, J. D. Maher and Frank K. Roberts were, on April 9th 1894, elected members of the common council of the city, all of them duly qualifying as such before the meeting of the council of the city held April 16 1894. The persons so elected mayor and members of the common council on April 9th 1894, with the exception of Bailey, who was re-elected councilman, did not actually enter upon their duties as officers until May 7th 1894, and Jeter, Bailey, Hoffmann Green and Lucas continued to act publicly as mayor and members of the common council of the city until May 7th 1894, without protest from any person, and held seven meetings of the council between and including the date of April 16th 1894 and May 7th 1894.

All of the bonds and coupons sued on were in the form and bore date and were signed and attested as alleged in the complaint, but some of them were signed by William T. Jeter on April 16th 1894, after the qualification of his successor. Whether those sued on were among those signed by Jeter after the qualification of his successor does not appear.

On April 16th 1894, to which date the common council of the city had regularly adjourned, Jeter, acting as mayor, and Bailey, Hoffmann, Green and Lucas being present and acting as the common council of the city, and no bids having been received for the purchase of the refunding bonds issued by the city under ordinance 320, the proposition of Coffin & Stanton to take all the bonds, dated February 27th 1894, was accepted, upon the condition that they should furnish satisfactory security for the faithful performance of the agreement contained in that proposition.

Jeter as mayor, and Lucas, Bailey, Hoffman and Green, as members of the common council, publicly met on April 23d 1894, pursuant to adjournment of the common council, and, assuming to act as mayor and members of the common council of said defendant city, without protest or opposition from any one, accepted and approved a bond presented by Coffin & Stanton for the faithful performance of their proposed agreement, and directed the clerk of the defendant city to deliver to them the above refunding bonds, and all of them were in accordance with such direction delivered to Coffin & Stanton on April 24th 1894.

All of the nine bonds and coupons sued on matured April 15th 1895, and no part of them has been paid.

Coffin & Stanton never complied with the agreement upon which the bonds and coupons were delivered to them, and the defendant city never received any consideration on account of the issuing of the bonds, other than the promise of Coffin & Stanton to assume the payment of the bonds mentioned in their agreement.

It thus appears that the construction of the waterworks was brought about by the agreement between the city and Coffin & Stanton, under which the city was to purchase such works when they were completed;

That the waterworks were completed and were accepted by the city, and the city agreed to assume and pay the outstanding bonds issued by the Water Company in order to provide money with which to construct the waterworks, such bonds being secured (as was provided for by the agreement between the city and Coffin & Stanton) by a first mortgage upon the franchise and property of the Water Company;

That the city by ordinance proposed to refund its indebtedness under the act of 1893, describing in such ordinance 89 of the above first mortgage bonds of the Water Company which it had assumed to pay, and stating therein that those bonds were a valid lien and charge upon the property known as the city waterworks, and became thereby a part of the bonded indebtedness of the city;

That a special election was ordered to determine whether the qualified electors approved the proposed refunding;

That notice of such election was given, which described the bonds proposed to be refunded and which stated that the above 89 bonds had been assumed by the city as part of the purchase price of the waterworks, and were a valid lien upon such works;

That more than two-thirds of the qualified voters approved the proposed refunding, including the above 89 first mortgage bonds;

That the city directed that any refunding bonds issued should state, upon their face, by way of recital, that they were issued under and in pursuance of the above act of 1893, and in conformity with the Constitution of California, the ordinance of the city, and with a vote of more than two-thirds

of all the qualified voters of the city at a special election duly and legally called, held and conducted as provided by the act of 1893; and,

That the above bonds should upon their face further certify and declare that all acts, conditions and things required by law to be done precedent to and in the issue of the bonds had been properly done, happened and performed, in legal and due form, as required by law.

The Circuit Court of Appeals was of opinion that purchasers of the bonds were bound to take notice of the ordinances of the city, and that the entire issue of $360,000 in refunding bonds was invalid by reason of its including the $89,000 in bonds executed by the Water Company, the payment of which was assumed by the city. It reversed the judgment of the Circuit Court with directions to enter judgment for the city on the bonds.

1. The refunding act of March 1st 1893, amendatory of the act approved March 15th 1883, is as follows:

"§ 1. That section one of the above-entitled act is hereby amended to read as follows: '§ 1. That whenever any incorporated city or town, other than cities of the first class in this State, has an *outstanding indebtedness, evidenced by bonds and warrants thereof*, the common council, board of trustees, or other governing body thereof, shall have power to submit to the qualified electors of such city or town, at an election to be held for that purpose, the question of refunding such indebtedness. Said election shall be called and held in the same manner in which other elections are held in such city or town. The notice of such election shall recite the indebtedness to be refunded, together with the denomination, character, time of payment, rate of interest, as well as all other details of the bonds proposed to be issued. Such bonds shall be of the character known as "serials," one-fortieth of the principal being payable each year, together with interest due on all sums unpaid. Said bonds may be issued in denominations not to exceed one thousand dollars, nor less than one hundred dollars; principal and interest being payable in gold coin or lawful money of the United States, and either at the office of the treasurer of such city or town, or at a designated bank situated in the cities of San Francisco, New York, Boston or Chicago. Interest upon the same shall not exceed six per cent per annum, and may be payable semi-annually. Said bonds shall be sold in the manner provided by such city council, or other governing body, to the highest bidder for not less than their face value, in the same character of money in which they were payable. The proceeds of such sale shall be placed in the treasury to the credit of the funding fund, and shall be applied only for the purpose of refunding the indebtedness for which they have been issued. Said common council, or other governing body, shall, at the time of fixing the general tax levy for each year, and in the same

manner for such tax levy provided, levy and collect annually, each year, sufficient money to pay one-fortieth part of the principal of such bonds, and also the annual interest upon the portion remaining unpaid.'

"§ 2. That section two of said act be amended so as to read as follows: '§ 2. Whenever sufficient money is in the funding fund, in the hands of the treasurer, to redeem one or more of the outstanding bonds proposed to be refunded, he shall publish once a week for two weeks in some newspaper of general circulation published in such city or town, if there be any, a notice to the effect that he is prepared to pay such bond or bonds, (giving the number thereof,) and if the same are not presented for redemption within thirty days after the first publication of such notice, the interest on such bonds will cease. He shall, at the same time, deposit in the post office a copy of such notice, enclosed in a sealed envelope, with the postage paid thereon, addressed to the owner or owners of such bond or bonds, at the post office address of such owner or owners, as shown by the record thereof kept in the treasurer's office. If such bond or bonds are not presented within the time specified in such notice, the interest thereon shall then cease, and the amount due be set aside for the payment of the same, whenever presented. All redemption of bonds shall be made according to the priority in the order of their issuance, beginning at the first number. Whenever such outstanding bonds are surrendered and paid, the treasurer shall proceed to cancel the same by endorsing on the face thereof the amount for which they are received, the word "canceled" and the date of cancellation. He shall also keep a record of such bonds so redeemed, and shall make a report of the same to the common council, or other governing body of such city or town, at least once a month, accompanying the same therewith by the bonds which have been taken up and canceled.'

"§ 3. That section three of said act be amended so as to read as follows '§ 3. All moneys which shall remain in said funding fund after all outstanding bonds as were proposed to be refunded have been taken up and canceled, shall be paid into the general fund of such city or town, and become a part thereof.'

"§ 4. This act shall take effect and be in force immediately after its passage."

One of the contentions of the city is that the words "outstanding indebtedness, evidenced by bonds and warrants thereof," in this act do not embrace the 89 bonds executed by the Water Company. Those bonds, although not executed by the city, certainly constituted a part of its outstanding indebtedness, for the reason that the city had assumed to pay them. Both the city authorities and the qualified electors so regarded the matter. The city's assumption of the bonds imposed as much obligation upon it to pay them as if it had itself directly executed and issued them. It could not acquire complete ownership of the waterworks without paying for them,

and it took a deed for the waterworks expressly subject to a valid lien in favor of the Water Company's first mortgage bonds, including the above 89 bonds. In every substantial sense, therefore, these bonds were part of the city's outstanding bonded indebtedness. Such is the argument made in behalf of the plaintiff, and its force is recognized. But whether this view rests upon a sound construction of the act of 1893, we need not now say. That question is left open for determination when it must be decided, and our judgment is placed upon another ground, to be now stated.

2. The refunding bonds in suit, as we have seen, recited that they were issued under, in pursuance of, and in conformity with the act of 1893, the Constitution of California, and the ordinances of the city of Santa Cruz, as well as in conformity with the vote of two-thirds of all the qualified electors of the city, voting at a special election duly called, held and conducted, as provided by the above act; also, that *all* acts, conditions and things required by law to be done precedent to and in the issuing of the bonds, had been properly done and performed, in legal and due form, as required by law. As between the city and a *bona fide* purchaser of such bonds, can the city be heard to say that the bonds were not of the class embraced by the words in the act of 1893, "outstanding indebtedness, evidenced by the bonds and warrants thereof?" Is the city estopped to dispute the truth of the recitals in its refunding bonds, there being nothing in such recitals indicating or suggesting that they were not true?

The city contends that it is not thus estopped, because the ordinances, under which the special election was held, disclosed the fact that the 89 first mortgage bonds of the Water Company were included in the proposed refunding; that purchasers were bound to take notice of the provisions of such ordinances; and that the ordinances, being examined, would have disclosed the fact that the bonds, although assumed by the city, were executed by the Water Company, and not by the city. Let us see whether a purchaser of the bonds was bound to know what those ordinances contained.

The first case to which we will refer is that of *Hackett* v. *Ottawa*, 99 *U. S.* 86, 95. The municipal bonds sued on in that case were issued by the city of Ottawa, Illinois. They contained recitals to the effect that they were issued by virtue of the charter of the city empowering it to borrow money, issue bonds therefor and pledge its credit for their payment, and in accordance with certain ordinances of which the titles and dates were given. The bonds stated upon their face that one of those ordinances, passed June 15th 1869, was entitled "An ordinance to provide for a loan for municipal purposes," and the other, "An ordinance to carry into effect the ordinance of June 15th 1869, entitled "An ordinance for a loan for municipal purposes." The principal defense was that the recital as to a loan for municipal purposes was untrue; that the bonds were not

issued for municipal or corporate purposes, but as a simple donation to a private corporation whose business was in nowise connected with or under the control of the city, which facts, it was contended, appeared upon the faces of the ordinances themselves.

The Constitution of Illinois provided that counties, townships, school districts, cities, towns and villages "may be vested with power to assess and collect taxes for corporate purposes." But this court did not deem it necessary to determine what were corporate purposes within the meaning of the Illinois Constitution, saying: "A direct decision of that question does not seem to be essential to the disposition of this case. We content ourselves with stating the propositions which counsel have urged upon our consideration, and without expressing any settled opinion as to what are corporate purposes within the meaning of the Illinois Constitution, we pass to another point, which, in our judgment, is fatal to the defense. It is consistent with the pleas filed by the city that the testator of plaintiffs in error purchased the bonds before maturity for a valuable consideration, without any notice of want of authority in the city to issue them, and without any information as to the objects to which their proceeds were to be applied, beyond that furnished by the recited titles of the ordinances. For all corporate purposes, as we have seen, the council, if so instructed by a majority of voters attending at an election for that purpose, had undoubted authority, under the charter of the city, to borrow money upon its credit and to issue bonds therefor. The bonds in suit, by their recitals of the titles of the ordinances under which they were issued, in effect, assured the purchaser that they were to be used for municipal purposes, with the previous sanction, duly given, of a majority of the legal voters of the city. If he would have been bound, under some circumstances, to take notice, at his peril, of the provisions of the ordinances, he was relieved from any responsibility or duty in that regard by reason of the representation, upon the face of the bonds, that the ordinances under which they were issued were ordinances 'providing for a loan for municipal purposes.' Such a representation by the constituted authorities of the city, under its corporate seal, would naturally avert suspicion of bad faith upon their part, and induce the purchaser to omit an examination of the ordinances themselves. It was, substantially, a declaration by the city with the consent of a majority of its legal voters, that purchasers need not examine the ordinances, since their title indicated a loan for municipal purposes. The city is therefore estopped, by its own representations, to say, as against a *bona fide* holder of the bonds, that they were not issued or used for municipal or corporate purposes. It cannot now be heard, as against him, to dispute their validity. Had the bonds, upon their face, made no reference whatever to the charter of the city, or recited only those provisions which empowered the

council to borrow money upon the credit of the city and to issue bonds therefor, the liability of the city to him could not be questioned. Much less can it be questioned, in view of the additional recital in the bonds, that they were issued in pursuance of an ordinance providing for a loan for municipal purposes; that is, for purposes authorized by its charter. *Supervisors* v. *Schenck*, 5 *Wall.* 772. It would be the grossest injustice, and in conflict with all the past utterances of this court, to permit the city, having power under some circumstances to issue negotiable securities, to escape liability upon the ground of the falsity of its own representations, made through official agents and under its corporate seal, as to the purposes with which these bonds were issued. Whether such representations were made inadvertently, or with the intention, by the use of inaccurate titles of ordinances, to avert inquiry as to the real object in issuing the bonds, and thereby facilitate their negotiation in the money markets of the country, in either case, the city, both upon principle and authority, is cut off from any such defense." The same principles were announced in *Ottawa* v. *National Bank*, 105 *U. S.* 342, 343.

A case directly in point is that of *Evansville* v. *Dennett*, 161 *U. S.* 434, 443. That was an action on negotiable bonds payable to bearer and issued by the city of Evansville, Indiana, in payment of a subscription of stock in a railroad company. Each bond recited that it was issued in payment of such subscription, "made in pursuance of an act of the Legislature of the State of Indiana, and ordinances of the city council of said city, passed in pursuance thereof." There were other negotiable bonds involved in that suit, which were issued by the city, each reciting that it was issued by virtue of the city's charter, by virtue of a certain act of Assembly (its title and date being given), and by virtue of certain resolutions of the city council of named dates; and that the faith, credit, real estate, revenues and all resources of the city were irrevocably pledged for the payment of principal and interest. It was contended in that case that the ordinances of the city, if examined, would show that the election held in the city upon the question of issuing the bonds was not legally held, and therefore that the bonds were issued without authority and were void. This court, upon a review of former decisions, said: "As, therefore, the recitals in the bonds import compliance with the city's charter, purchasers for value having no notice of the non-performance of the conditions precedent, were not bound to go behind the statute conferring the power to subscribe, and to ascertain, by an examination of the ordinances and records of the city council, whether those conditions had, in fact, been performed. With such recitals before them they had the right to assume that the circumstances existed which authorized the city to exercise the authority given by the Legislature."

The only other case to which we need refer upon this point is *Gunnison County Commissioners* v. *Rollins*, 173 *U. S.* 255, 262, 274, 275. That was

a suit upon negotiable coupons attached to negotiable bonds executed by the Board of Commissioners of Gunnison County, Colorado, and which recited that they were issued "in exchange at par for valid floating indebtedness of the county outstanding prior to September 2d 1882, under and by virtue of and in full conformity with the provisions of an act of the General Assembly of the State of Colorado entitled 'An act to enable the several counties of the State to fund their floating indebtedness,' approved February 21st 1881; that 'all the requirements of law have been fully complied with by the proper officers in the issuing of the bond;' that the total amount of the issue did 'not exceed the limit prescribed by the Constitution of the State of Colorado;' and that such issue had been authorized by a vote of a majority of the duly qualified electors of the county, voting on the question at a general election held in the county on the 7th of November 1882."

The question presented was whether such recitals estopped the county from asserting against a *bona fide* holder for value that the bonds created an indebtedness in excess of the limit prescribed by the Constitution of Colorado. The principal defense was that the purchaser of the bonds was bound to take notice of the orders and records of the county commissioners authorizing the issue of the refunding bonds, and that an examination of those orders would have disclosed the fact that the bonds were in excess of the limit prescribed by the Constitution of the State.

After a review of previous cases, namely, *Buchanan* v. *Litchfield*, 102 *U. S.* 278, 290, 292, *Orleans* v. *Pratt*, 99 *U. S.* 676, *Northern Bank of Toledo* v. *Porter Township*, 110 *U. S.* 608, 616, 619, *Dixon County* v. *Field*, 111 *U. S.* 83, 92–94, *Lake County* v. *Graham*, 130 *U. S.* 674, 680, 683–684, *Chaffee County* v. *Potter*, 142 *U. S.* 355, 363, 364, 366, and *Sutliff* v. *Lake County Commissioners*, 147 *U. S.* 230, 235, 237–8, this court held that the *Gunnison* case was controlled by the decision in *Chaffee County* v. *Potter*, which was a suit on coupons of negotiable municipal bonds that contained the same recitals as were made in the Gunnison County bonds. We said: "It was expressly decided in the *Chaffee County* case that the statute under which the bonds there in suit (the bonds here in suit being of the same class), authorized the county commissioners to determine whether the proposed issue of bonds would in fact exceed the limit prescribed by the Constitution and the statute; and that the recital in the bond to the effect that such determination had been made, and that the constitutional limitation had not been exceeded, taken in connection with the fact that the bonds themselves did not show such recital to be untrue, estopped the county, under the law, from saying that the recital was not true. We decline to overrule *Chaffee County* v. *Potter*, and upon the authority of that case, and without re-examining or enlarging upon the grounds upon which the decision therein proceeded, we adjudge that as against the plaintiff the

county of Gunnison is estopped to question the recital in the bonds in question to the effect that they did not create a debt in excess of the constitutional limit, and were issued by virtue of and in conformity with the statute of 1881, and in full compliance with the requirements of law." Again: "It is insisted with much earnestness that the principles we have announced render it impossible for a State, by a constitutional provision, to guard against excessive municipal indebtedness. By no means. If a State constitution, in fixing a limit for indebtedness of that character, should prescribe a definite rule or test for determining whether that limit has already been exceeded or is being exceeded by any particular issue of bonds, all who purchase such bonds would do so subject to that rule or test, whatever might be the hardship in the case of those who purchased them in the open market in good faith. Indeed, it is entirely competent for a State to provide by statute that all obligations, in whatever form executed by a municipality under its existing laws, shall be subject to any defense that would be allowed in cases of non-negotiable instruments. But for reasons that every one understands, no such statutes have been passed. Municipal obligations executed under such a statute could not be readily disposed of to those who invest in such securities."

Applying to the present case the principles heretofore announced by this court, is there any escape from the conclusion that the City of Santa Cruz is estopped to dispute the truth of the recitals in the bonds in suit, which stated that they were issued in pursuance of the act of 1893 as well as in conformity with the Constitution of California authorizing it to incur indebtedness or liability with the assent of two-thirds of the qualified voters at an election held for that purpose, and that all acts, conditions and things required by law to be done precedent to issuing the bonds had been properly done and performed in due and lawful form as required by law? We think not.

The city of Santa Cruz had power, under the Constitution and laws of California, to refund its outstanding indebtedness, evidenced by bonds and warrants. The nature and extent of such indebtedness were matters peculiarly within the knowledge of its constituted authorities. When, therefore, the refunding bonds in suit were issued with the recitals therein contained, the city thereby represented that it issued them under and in pursuance of and in conformity with the act of 1893 and the Constitution of the State. As nothing on the face of the bonds suggested that such representations were false, purchasers had the right to assume that they were true, especially in view of the broad recital that everything required by law to be done and performed before executing the bonds had been done and performed by the city. As there was power in the city to issue refunding bonds to be used in discharging its outstanding indebtedness of a specified kind, purchasers were entitled to rely upon the truth of the recitals in the bonds that they

were of the class which the act of 1893 authorized to be refunded. They were under no duty to go further and examine the ordinances of the city to ascertain whether the recitals were false. On the contrary, purchasers could assume that the ordinances would disclose nothing in conflict with the recitals in the bonds.

The Circuit Court having found—and as we think correctly—that the "assignors" of the plaintiff, that is, the parties who placed the bonds in his hands, were *bona fide* purchasers, without notice of anything affecting the truth of the recitals in them, our conclusion is that the city cannot escape liability by reason of the fact, disclosed by its ordinances, that the 89 first mortgage bonds of the Water Company assumed by the city were included in its refunding scheme.

3. It is said, however, that the act of 1893 was repugnant to the Constitution of California, in that it is a special law, relating to a subject concerning which that Constitution required all laws to be general. In *City of Los Angeles* v. *Teed*, 112 *Cal.* 319, 328, 329, the validity of the act of 1883 and that of 1893 amendatory thereof having been questioned by counsel, the Supreme Court of California said: "On March 15th 1883 an act was passed (*Stat.* 1883, *p.* 370) authorizing the governing body of every municipal corporation, other than cities of the first class, to fund or refund *any* indebtedness of the corporation by a vote of four-fifths of their number. That act authorized the issue of bonds, to be exchanged for any existing indebtedness, or to be sold for money to be applied to the payment of such indebtedness. It is contended that this act violates the provision of the Constitution against special legislation. But there can be no question that the act classifying municipal corporations is constitutional, (*Pritchett* v. *Stanislaus County*, 73 *Cal.* 310,) and that in matters pertaining to municipal organization the legislature may make different regulations for the different classes so created. *Pasadena* v. *Stimson*, 91 *Cal.* 249. The subject-matter of the act in question—the funding of municipal indebtedness—is 'peculiarly a matter pertaining to municipal organizations, and still more peculiarly a matter as to which cities of large population require different provision from that suitable to cities or towns of small population.' The act is, therefore, not obnoxious to that objection." Referring to the act of 1893, the court said: "It is contended that this act also is invalid, as special legislation; but what we have said as to the act of 1883 on this question applies equally to this act." Nothing further need be said upon this question.

4. Another defense is that Jeter, who signed the bonds, was not the rightful mayor of Santa Cruz. The facts bearing upon this point have been heretofore stated and need not be repeated. The Circuit Court said:

"It is claimed by the defendant that, as it is not shown that the bonds sued on were signed by Wm. T. Jeter before the qualification of his suc-

cessor in the office of mayor, the plaintiff has failed to prove that the bonds were signed by an officer authorized to do so, and they must therefore be held void, even in the hands of *bona fide* purchasers, under the rule declared in *Coler* v. *Cleburne*, 131 *U. S.* 162. That case is not authority for the proposition that the action of a *de facto* officer in signing bonds would not be as binding upon the municipality for which he assumes to act as that of an officer *de jure;* and it seems clear to me that if Jeter was the *de facto* mayor when he signed the bonds sued on, then such signature by him was a compliance with the ordinance requiring them to be signed by the mayor; and so, also, if he was *de facto* mayor, and those assuming to act as the common council of the defendant were *de facto* members of the common council at the time when he and they assumed as mayor and common council to accept the proposition of Coffin & Stanton in relation to the bonds, and directed their delivery to that firm, then such acts upon their part are to be treated, so far as concerns the public and third persons having an interest in what was done by them, as the acts of the *de jure* mayor and common council of the city. The rule that the acts of a *de facto* officer are valid as to the public and third persons, is firmly established, although it is sometimes difficult to determine whether the evidence is such as to warrant a finding that a particular act or acts, the legality of which may be in issue in a given case, were those of a *de facto* officer. The contention of the defendant is that Jeter was not the *de facto* mayor at the time of the signing and delivery of the bonds, nor were the old members of the common council, who continued to act as such after the qualification of their successors, and until after the bonds were delivered to Coffin & Stanton, *de facto* members of the common council of defendant, after the qualification of their successors. Whether one was or was not a *de facto* officer at the time when he assumed to perform duties belonging to a public office, is a mixed question of law and of fact, *State ex rel Van Arminge* v. *Taylor* 108 *N. C.* 196; *S. C.* 12 *L. R. A.* 202; *United States* v. *Alexander*, 46 *Fed. Rep.* 728. And in passing upon the question presented by defendant's contention upon this point, it is necessary to first consider what facts are sufficient to constitute a *de facto* officer. A *de facto* officer may be defined as one whose title is not good in law, but who is in fact in the unobstructed possession of an office and discharging its duties in full view of the public, in such manner and under such circumstances as not to present the appearance of being an intruder or usurper. When a person is found thus openly in the occupation of a public office, and discharging its duties, third persons having occasion to deal with him in his capacity as such officer are not required to investigate his title, but may safely deal with him upon the assumption that he is a rightful officer. Thus it is said in *Petersilea* v. *Stone*, 119 Mass 468: "Third persons, from the nature of the case, cannot always investigate the right of one assuming to hold an important office,

even so far as to see that he has color of title to it by virtue of some appointment or election. If they see him publicly exercising its authority, if they ascertain that this is generally acquiesced in, they are entitled to treat him as such officer, and, if they employ him as such, should not be subjected to the danger of having his acts collaterally called in question."

After referring to *Jhons* v. *People*, 25 *Mich.* 503, *Attorney General* v. *Crocker*, 138 *Mass.* 214, *Hamlin* v. *Kassafer*, 15 *Oregon*, 456, *State* v. *Williams*, 5 *Wis.* 308, and *Magenau* v. *City of Fremont*, 30 *Neb.* 843, the Circuit Court said: "The foregoing cases sufficiently illustrate the principle upon which courts proceed in determining whether one who has assumed to act as a public officer was at the time an officer *de facto*, and it only remains to apply the rule which they establish to the facts which have been already stated as appearing in the present case, and in doing so there is but one conclusion that can be reached, and that is that Jeter was the *de facto* mayor of the city of Santa Cruz, and on the sixteenth day of April, 1894, at the time when he signed the bonds in question, and he and the persons who assumed to act as members of its common council, on the sixteenth and twenty-third of April, 1894, were on those days the *de facto* mayor and the *de facto* members of the common council of the defendant city."

We are entirely satisfied with the treatment of this question by the Circuit Court, and deem it unnecessary to make any additional observations.

5. All of the bonds and coupons sued on were duly transferred to the plaintiff before the commencement of this action. It is agreed that he had at the bringing of this action the legal title to all of them, although he paid no money consideration for the transfer, and that the bonds and coupons were transferred to him for collection only.

It is contended by the defendant that it does not appear that the Circuit Court had jurisdiction, since the citizenship of the persons who put the bonds in the plaintiff's hands for collection is not set forth.

Prior to the passage of the Judiciary Act of August 13th 1888, c. 866, 25 *Stat.* 433, it was the settled rule that the holder of a negotiable instrument payable to bearer was not an "assignee" thereof within the meaning of the Judiciary Act of 1789, c. 20, or the act of March 3d 1875, c. 137, but was the holder in virtue of an original and direct promise moving from the maker to the bearer, and could sue without reference to the citizenship of the original or any intermediate holder. *Thompson* v. *Perrine*, 106 *U. S.* 589, 592–3.

The above act of 1888 did not change this rule, but it made some alteration of former statutes. Its first section excluded from the cognizance of any Circuit or District Court of the United States "any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent

holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made." 25 *Stat.* 434.

The defendant, the city of Santa Cruz, is a corporation within the meaning of that section. *Loeb* v. *Columbia Township*, 179 *U. S.* 472, 485. So that, in respect of the bonds and coupons here in suit—they being payable to bearer and having been made by a corporation—the complaint need not have disclosed the citizenship of any previous holder of the bonds. It shows—and nothing more was necessary so far as citizenship was concerned—a diversity of citizenship as between the holder of the legal title to the bonds and coupons and the defendant city.

But the act of 1888 did not repeal the fifth section of the act of March 3d 1875, c. 137 (*Lehigh Mining & Mfg. Co.* v. *Kelly*, 160 *U. S.* 327, 339; *Lake Co. Comrs.* v. *Dudley*, 173 *U. S.* 243, 251,) which provides "that if, in any suit, commenced in a Circuit Court or removed from a State court to a Circuit Court of the United States, it shall appear to the satisfaction of said Circuit Court, any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed as justice may require, and shall make such order as to costs as shall be just." 18 *Stat.* 470, 472.

Does the present case come within this provision of the act of 1875 in respect of any cause of action embraced in it? It does not, if the only objection to the jurisdiction of the Circuit Court is that the plaintiff was invested with the legal title to the bonds and coupons simply for purposes of collection. But if the transfer was made for the purpose, in any way, of creating a case cognizable in the Circuit Court, of which it could not otherwise have taken cognizance, then the duty of this court is to take notice of that fact and give effect to the statute of 1875. *Metcalf* v. *Watertown*, 128 *U. S.* 586, 587, *and authorities there cited.* The jurisdiction of the Circuit Court, it must be observed, depends equally on the citizenship of the parties and the value of the matter in dispute. If the transferrers of the plaintiff were citizens of States other than California, as they seem to have been, each could have sued in the Circuit Court, if the amount in dispute was sufficient; and therefore the transfers in such cases were not a fraud on the jurisdiction of the Circuit Court, *so far as the question of diverse citizenship was concerned.* But if the transfer enabled the plaintiff to embrace in his suit a claim or claims against the city of

which the Circuit Court could not have entertained jurisdiction, at the suit of the transferrer, because of the insufficiency of the amount in dispute, then the act of 1875 would apply.

This question was presented and decided in *Bernards Township* v. *Stebbins*, 109 *U. S.* 341, 355, 356, which was an action on negotiable bonds brought in the Federal court sitting in New Jersey, the plaintiffs being citizens of New York and the defendant a municipal township of New Jersey. Referring to the decision in *Williams* v. *Nottawa*, 104 *U. S.* 209, we said that it "establishes that the Circuit Court of the United States cannot, since the act of 1875, entertain a suit upon municipal bonds payable to bearer, the real owners of which have transferred them to the plaintiffs of record for the sole purpose of suing thereon in the courts of the United States for the benefit of such owners, who could not have sued in their own names, either by reason of being citizens of the same State as the defendant, *or by reason of the insufficient value of their claims.* The principle of that decision is equally applicable to suits in equity to assert equitable rights under such bonds." Again, in the same case: "It follows, that these bills should have been dismissed so far as regarded the bond for $200, owned by a citizen of New York in the first case, and also to all the bonds owned by citizens of New Jersey in either case. But no valid objection has been shown to the maintenance of these bills, so far as regards those bonds of which plaintiffs are the bearers, and which are actually owned, either by themselves, or by other citizens of New York or Pennsylvania, to a sufficient amount *by each owner* to sustain the jurisdiction of the Circuit Court."

The same view of the act of 1875 was taken in *Lake Commissioners* v. *Dudley*, 173 *U. S.* 243, 252, which was an action upon coupons payable to bearer. This court said: "From the evidence in this cause of Dudley himself it is certain that he does not in fact own any of the coupons sued on, and that his name, with his consent, is used in order that the Circuit Court of the United States may acquire jurisdiction to render judgment for the amount of all the coupons in suit, a large part of which are really owned by citizens of Colorado, who, as between themselves and the Board of Commissioners of Lake County, could not invoke the jurisdiction of the Federal court, but must have sued, if they sued at all, in one of the courts of Colorado. It is true that some of the coupons in suit are owned by corporations of New Hampshire, who could themselves have sued in the Circuit Court of the United States. But if part of the coupons in question could not by reason of the citizenship of the owners have been sued on in that court, except by uniting the causes of action arising thereon with causes of action upon coupons owned by persons or corporations who might have sued in the Circuit Court of the United States, and if all the causes of action were thus united for the collusive purpose of making a 'case' cognizable

by the Federal court as to every issue made by it, then the act of 1875 must be held to apply, and the trial court, on its own motion, should have dismissed the case without considering the merits."

Does the record show that the Circuit Court was without jurisdiction of some of the causes of action embraced by the complaint? We say "record," because this court will not reverse a judgment for want of jurisdiction in the Circuit Court, if its jurisdiction sufficiently appears either from the pleadings or from the record. *Railway Company* v. *Ramsey*, 22 *Wall.* 322; *Briges* v. *Sperry*, 95 *U. S.* 401; *Robertson* v. *Cease*, 97 *U. S.* 646, 648. The complaint here shows diverse citizenship, as between the plaintiff and the defendant city, but the record reveals the fact that the plaintiff included in his suit a large number of claims owned by citizens of States other than California, but which, by reason of their small amount, could not have been sued on separately in the Circuit Court by the persons or corporations, the real owners, who put them in plaintiff's hands for collection.

Of this there can be no doubt. The entire issue of refunding bonds was 360, of $1,000 each, numbered consecutively from one to three hundred and sixty. They were of the character known as "serials," each series consisting of nine bonds. The first series included the bonds numbered from one to nine, both inclusive, and each succeeding series included the nine bonds numbered consecutively after those embraced in the next preceding series. The bonds of the first series fell due April 15th 1895, and were the only bonds that had become due when the present action was brought. The remaining series were made payable in consecutive order on the 15th day of April in each succeeding calendar year thereafter until and including the year 1934. Now, this suit is for the amount due on nine of the forty bonds of $1,000 each, constituting the first series, and falling due April 16th 1895, and two hundred and eighty-two coupons of $50 each, all which coupons, above the coupon of bond No. 40 of the first series, of were attached to bonds that were not yet due. No owner of a $50 coupon attached to a bond not due could have sued upon it in the Circuit Court. Each coupon of that amount was a complete instrument, capable of supporting a separate action, in the proper forum, without reference to the maturity or ownership of the bonds to which they were attached. *Koshkonong* v. *Burton*, 104 *U. S.* 668, *and authorities there cited*; *Elgin* v. *Marshall*, 106 *U. S.* 578. No owner of coupons, aggregating less than $2,000, could have sued in the Circuit Court by reason of the bonds to which they were attached (but which were not due) exceeding the jurisdictional amount. But when the several owners of $50 coupons which were due, but which coupons were attached to bonds not due, put them all in the hands of the plaintiff for collection, the amount appeared to be sufficient for purposes of jurisdiction. Thus a case was made by which the

Circuit Court was led to take cognizance of certain claims too small for its jurisdiction if they had been severally sued on by the real owners, although there was jurisdiction as to the parties who owned eight of the nine bonds in suit. It also appears that one of the transferrers of the plaintiff owned only one bond of a $1,000. The value of the matter in dispute, as to him, was only the amount of that bond and one coupon of $50.

We adjudge that, as the plaintiff does not own the bonds or coupons in suit, but holds them for collection only, the Circuit Court was without jurisdiction to render judgment upon any claim or claims, whether bonds or coupons, held by a single person, firm or corporation against the city and which, considered apart from the claim or claims of other owners, could not have been sued on by the real owner by reason of the insufficiency of the amount of such claim or claims.

The specifications of errors assigned cover eighty pages of the elaborate brief of counsel for the city. They present many minor questions that are not discussed in this opinion. But what has been said embraces every point of substance or that requires consideration and disposes of the case upon its real merits.

The judgment of the Circuit Court of Appeals is reversed, with directions to the Circuit Court to set aside its judgment and enter such judgment as may be in conformity with this opinion.

Reversed.

True copy.

Test:

Clerk Supreme Court, U. S.